Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 257.

THE CAPITAL CITY DAIRY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF OHIO EX REL. ATTORNEY GENERAL, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

On April 12, A. D. 1898, the State of Ohio on the relation of its attorney general filed in the supreme court of Ohio a petition in *quo warranto* against the Capital City Dairy Company, a corporation organized and existing under the laws of the State of Ohio.

Said petition averred that the said corporation had violated the laws of Ohio and misused its corporate authority, franchises, and privileges, and assumed franchises and privileges not granted to it, and had assumed and exercised rights, privileges, and franchises specially inhibited by law, as follows:

First. It was charged that the said corporation had manufactured and sold an article in imitation and semblance of butter, which said article was made out of animal and vegetable oils, and compounded with milk or cream, and both, which said article was not then and there in separate and distinct form, and in such a manner as would advise consumers of its real character, and was not free from coloring matter and other ingredients, causing it to look like and appear to be butter; and said article was not butter, but was an article made in imitation and semblance thereof.

Second. It was charged that said corporation manufactured, sold, and offered for sale, and had in its possession, with intent to sell, large quantities of oleomargarine, which said oleomargarine contained coloring matter, to wit, annotto and other coloring matter unknown to relator.

Third. It was charged that said corporation manufactured and sold a substance purporting and appearing to be butter and having the semblance of butter, but which substance was not butter, but was oleomargarine, and that the packages, rolls, and parcels thereof were not distinctly and durably stamped or painted, stenciled or marked in the true name thereof in the ordinary bold-faced capital letters required by the act of May 17, 1886.

Fourth. It was charged that said corporation refused to deliver and furnish to the duly appointed, qualified, and acting inspector and agent of the dairy and food commissioner of Ohio any sample or quantity of the oleomargarine manufactured by it, although demanded by him, and the value of the same for a ten-pound package thereof, or any other reasonable quantity thereof, was tendered it for the analysis thereof, contrary to section 4 of the act of March 20, 1884, and that said corporation refused to permit him to

examine or cause to be examined any of the products manufactured by it.

Fifth. It was charged that all of said violations of law contained in the preceding paragraphs were committed by the defendant for the purpose of evading the law, and for the purpose of deceiving the people of Ohio and other States as to the real character of its said product, contrary to the act of March 7, 1890.

The petition prayed that the franchise of said corporation might be forfeited and that its property be turned over to trustees to be administered according to law. (See printed Record, pp. 1, 2, and 3.)

On May 21, A. D. 1898, the defendant filed an answer, consisting of seven defenses, which denied all the charges above set forth, except that it admitted using a harmless coloring matter during a short period, which coloring matter caused its product, oleomargarine, to appear yellow at a season of the year when butter was of a white color. The defendant, moreover, averred that certain statutes of the State of Ohio, to wit, the act of March 7, 1890, and the act of May 16, 1894, were severally in contravention of and repugnant to the Constitution of the United States, and especially to section 8, article 1, and to the 5th and 14th articles of amendment.

By its seventh defense said corporation plead that said proceeding in *quo warranto* was in contravention of the Constitution of the United States. (See printed Record, pp. 5–11.)

The plaintiff demurred to the third, fourth, fifth, sixth, and seventh defenses. (See printed Record, pp, 11, 12.)

This demurrer, as we shall hereafter claim, searched the record and brought up for consideration not only the legal sufficiency of the answer, but also the legal sufficiency of the plaintiff's petition.

With its demurrer the plaintiff filed a reply (see printed Record, p. 12) which denied certain facts set up in the answer.

The entire case was submitted to the court at one time, both as to the demurrers and as to the issues of fact made by the pleadings, and thereupon the court found generally in favor of the plaintiff, without making any specific findings of law or fact. (See printed Record, pp. 15–17.)

Being foreclosed as to issues of fact, the question before us may be considered as raised by the demurrers to the answer, which to a certain extent serve the office of a general demurrer to the petition.

The opinion of the supreme court of Ohio will be found in the printed Record in this case, pp. 18–25. The case itself is reported under the title of "The State of Ohio *ex rel.* Attorney General *vs.* The Capital City Dairy Company," 62 O. S., 350, 358. We republish this opinion and make it a part of this brief under the head of "Appendix A."

From the judgment of ouster and the appointment of trustees to wind up its affairs the Capital City Dairy Company appealed to this court, a writ of error having been allowed by the chief justice of the supreme court of Ohio.

We do not understand that there is any question as to the corporation having a right to complain of said judgment, provided, of course, a Federal question is involved. Numerous authorities might be cited in support of this contention, but none of them could state the proposition with more force or elegance than it has in substance been stated by Mr. Justice Story, concurring with the majority of this court, in the decision of the famous Dartmouth College case, 4 Wheat., 519, 701:

"In respect to corporate franchises they are, properly speaking, legal estates vested in the corporation itself as soon as it is *in esse*. They are not mere naked powers granted to the corporation, but powers coupled with an interest. The property of the corporation vests upon the possession of its

franchises; whatever may be thought as to the corporators, it cannot be denied that the corporation itself has a legal interest in them. It may sue and be sued for them."

Assuming that the plaintiff in error has a right to prosecute this proceeding, two important questions will be urged upon the attention of the court:

First. Are the anti-oleomargarine laws of Ohio repugnant to and in contravention of the Constitution of the United States?

Second. Assuming that said laws are valid enactments, are the proceedings and judgment of the supreme court of Ohio, here complained of, repugnant to and in contravention of the Federal Constitution?

It was urged upon the hearing of the motions to dismiss or affirm that the validity of the various anti-oleomargarine statutes were not so distinctly attacked as to raise a Federal question. Without admitting this contention to have any foundation, it would seem to be answered by the very recent case of Yazoo & Mississippi Railway Company *vs.* Adams, 180 U. S., p. —, decided at this term of the court, where it is said that—

"Where the validity of a State statute is necessarily drawn into question, and the decision of the State court being in favor of its validity, this court will take jurisdiction. It is only where a right, privilege or immunity is claimed that the Federal question must be especially set up."

The seventh defense of the answer specifically avers that the proceedings in *quo warranto* are in contravention of the Constitution of the United States. Said defense should, perhaps, have included the statement that said proceeding and judgment, if said judgment followed the trend of the proceeding, would take the plaintiff in error's property, with-

out due process of law, and impair the obligation of a contract subsisting between the Capital City Dairy Company and the State of Ohio. Said proceeding and judgment, we expect to show, did and does impair said contract; that being so, this court may assume jurisdiction.

In Yazoo & Mississippi Railway Company *vs.* Adams, *supra*, it is said:

"As we have often held that where the impairment of a contract by State legislation is had, the existence or nonexistence of the contract is a Federal question, it is impossible to escape the conclusion that the foundation of the whole case was whether there was really a contract which had been impaired, and that this is necessary to the determination of the case.

"As already stated, this was the Federal question, and the fact that the Supreme Court did not in terms discuss the contract clause of the Constitution does not oust our jurisdiction."

In that case, until after final judgment, the pleadings nowhere showed that any Federal question was pressed upon the attention of the supreme court of Mississippi, nor did that tribunal discuss any Federal question, but this court said, in the case from which we have been quoting, that—

"If a Federal question is fairly presented by the record and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right within the meaning of sec. 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused."

In presenting this case we will, for convenience, discuss the questions mooted in an inverse order from that heretofore stated; and we will ask this court to determine whether or not the judgment of the supreme court of Ohio should be affirmed, even though the statutes hereafter referred to are valid; and should the decision be against us upon this point, we will ask this court to determine whether or not the anti-

oleomargarine statutes referred to and relied upon in the petition in *quo warranto* are valid laws.

The statutes which the plaintiff in error was accused of violating are assembled in Bates' Annotated Statutes, and for convenience they will be thus referred to in the discussion of this case. They read as follows:

(4200–7.) Every person manufacturing, offering or exposing for sale, or delivering to a purchaser, any drug or article of food included in the provisions of this act, shall furnish to any person interested, or demanding the same, who shall apply to him for the purpose, and shall tender him the value of the same, a sample sufficient for the analysis of any such drug or article of food which is in his possession. (Being sec. 4 of the act of May 16th, 1884, 81 O. L., 67.)

(4200–8.) Whoever refuses to comply, upon demand, with the requirements of section four, and whoever violates any of the provisions of this act, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars nor less than twenty-five dollars, or imprisoned not exceeding one hundred nor less than thirty days, or both. And any person found guilty of manufacturing, offering for sale or selling an adulterated article of food or drug under the provisions of this act, shall be adjudged to pay, in addition to the penalties hereinbefore provided for, all necessary costs and expenses incurred in inspecting and analyzing such adulterated articles of which said person may have been found guilty of manufacturing, selling or offering for sale. (Being sec. 5 of the same act.)

(4200–13.) No person, by himself or his agent, or his employé, shall render or manufacture for sale out of any animal or vegetable oils, not produced from unadulterated milk or cream from the same, any article in imitation or semblance of natural butter or cheese produced from pure unadulterated milk or cream from the same, nor compound with, or add to milk, cream or butter any acids or other deleterious substance, or animal fats or animal or vegetable oils not produced from milk or cream so as to produce any article or substance, or any human food, in imitation or semblance of natural butter or cheese, nor shall sell, keep for sale or offer for sale any article, substance or compound made, manufactured or produced in violation of the provisions of

this section, whether such article, substance or compound shall be made or produced in this State or elsewhere (87 O. L., 51).

(4200–14.) For the purpose of this act, the terms "natural butter and cheese," "natural butter or cheese produced from pure unadulterated milk or cream from the same, butter and cheese made from unadulterated milk or cream, butter or cheese, the product of the dairy," and butter or cheese, shall be understood to mean the products usually known by the terms butter and cheese, and which butter is manufactured exclusively from pure milk or cream or both, with salt and with or without any harmless coloring matter, and which cheese is manufactured exclusively from pure milk or cream or both, with salt and rennet and with or without any harmless coloring matter or sage. It is further provided that nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine, in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from any coloring matter or other ingredient causing it to look like or to appear to be butter, as above defined (87 O. L., 51).

(4200–15). Whoever violates the provisions of this act shall be guilty of a misdemeanor, and be punished by a fine of not less than one hundred dollars, nor more than five hundred, or not less than six months' nor more than one year's imprisonment, for the first offense, and by imprisonment for one year for each subsequent offense (87 O. L., 51).

(4200-16.) No person shall manufacture, offer or expose for sale, sell or deliver, or have in his possession with intent to sell or deliver, any oleomargarine which contains any methly (methyl) orange, butter yellow, annatto, analine dye or any other coloring matter (91 O. L., 274).

(4200–19.) The word "oleomargarine" as used in this act shall be construed to mean any substance, not pure butter of not less than eighty per cent. of butter fats, which substance is made as substitute for, in imitation of, or to be used as butter.

(4200–20.) Any manufacturer who violates any of the provisions of this act shall, upon conviction thereof, be fined in any sum not less than one hundred dollars nor more than five hundred dollars; and for each subsequent offense, in addition to the above fine, may be imprisoned in the county jail not more than ninety days. Any other person violating

any of the provisions of this act shall, upon conviction thereof, be fined not less than fifty dollars nor more than one hundred dollars. (See 91 O. L., 274.)

From an inspection of the record, this court might infer that the plaintiff in error had violated another section, to wit, section 4200–30, which reads as follows:

(4200–30.) That no person shall sell, expose or offer for sale or exchange, any substance purporting, appearing, or represented to be butter or cheese, or having the semblance of either butter or cheese, which substance is not made wholly from pure milk, or cream, salt and harmless coloring matter, unless it is done under its true name, and each vessel, package, roll or parcel of such substance has distinctly and durably painted, stamped, stenciled, or marked thereon the true name of such substance in ordinary bold-faced capital letters, not less than five-line pica in size, and also the name of each article or ingredient used or entering into the composition of such substance in ordinary bold-faced letters, not (less) than pica in size, or sell or dispose of in any manner to another any such substance without delivering with each amount sold or disposed of, a label on which is plainly or legibly printed in ordinary bold-faced capital letters, not less than five-line pica in size, the true name of such substance, and also the name of such articles used and entering into the composition of such substance in ordinary bold-faced letters, not less than pica in size, if the same be not made wholly from pure milk, or cream, salt and harmless coloring matter; and the words "butter," "creamery" or "dairy," or any word or combination of words embracing the same, shall not be placed on any vessel, package, roll or parcel, containing any imitation dairy product or substance not made wholly from pure milk, or cream, salt, and harmless coloring matter.

Although our record contains no finding of facts, we are sure that the learned counsel who has so ably and fairly represented the defendant in error throughout this litigation will concede that no claim was made by him at the trial nor was any evidence offered tending to prove that the plaintiff

in error did not comply with the provisions of this section. Indeed, the following averments in the answer filed in the court below will not be controverted:

"This defendant further represents and avers that no substance was ever manufactured or sold by it except oleomargarine; that all the oleomargarine ever manufactured or sold by it was so manufactured and sold in distinct and separate form, labelled in black letters at least five-eighths of an inch square "oleomargarine," and the name and per cent. of each ingredient therein, as provided by law. Said defendant says that it has expended thousands of dollars in advertising its business as a manufacturer and jobber of oleomargarine; that it has never pretended to manufacture or sell any butter; that it has never sold any oleomargarine except as such, and that all oleomargarine shipped from its factory or manufactured or sold thereat was not only labelled, stenciled, and marked as required by the statutes of this State, but also labelled and marked as required by the statutes of the United States and the regulations of its Internal Revenue Department, each package containing revenue stamps and labelled 'oleomargarine,' and in short this defendant says that it has never manufactured or sold any oleomargarine except as such and has never desired to sell any except as such.

"This defendant further denies that it has ever violated the laws of this State or done anything whether unlawful or not, for the purpose of deceiving the people of this country as to the real character of its product, contrary to the act of March 7th, 1890, or any other provisions of the laws of Ohio. It says, on the contrary, it has gone to great trouble and expense to advise the public of the fact that it manufactured and sold oleomargarine and nothing else." (See printed Record, p. 7.)

ASSIGNMENT OF ERRORS.

1. The supreme court of the State of Ohio erred in holding and deciding that the act of the General Assembly of the State of Ohio, passed March 7, 1890, entitled "An act to prevent deception in the sale of dairy products and preserve the public health," was not in violation of nor repugnant to the Constitution of the United States in any of the particulars as claimed by the said plaintiff in error, and further erred in deciding that said act of the General Assembly of the State of Ohio passed March 7, 1890, was and is valid and binding upon said plaintiff in error.

2. The supreme court of the State of Ohio erred in holding and deciding that an act of the General Assembly of the State of Ohio passed May 16, 1894, and entitled "An act to prevent fraud and deception in the manufacture and sale of oleomargarine and promote public health in the State of Ohio," is not in violation of nor repugnant to the Constitution of the United States in any of the particulars claimed by the said plaintiff in error, and further erred in deciding and holding said act of the General Assembly of the State of Ohio passed May 16, 1894, was and is valid and binding upon said plaintiff in error.

3. The supreme court of the State of Ohio erred in holding and deciding that an act of the General Assembly of the State of Ohio, passed May 17, 1886, entitled "An act to prevent adulteration of and deception in the sale of dairy products," as amended by the act of March 21, 1887, entitled "An act to amend sections 1, 6, and 7 of an act passed May 17, 1886, entitled 'An act to provide against the adulteration of food and drugs,'" is not in violation of nor repugnant to the Constitution of the United States in any of the particulars as claimed by the said plaintiff in error; and further erred in

holding and deciding that said act of the General Assembly of the State of Ohio passed May 17, 1886, as amended March 21, 1887, was and is valid and binding upon said plaintiff in error.

4. The supreme court of the State of Ohio erred in holding and deciding that section 4 of an act of the General Assembly of the State of Ohio, passed March 20, 1884, entitled "An act to provide against the adulteration of food and drugs," is not in violation of nor repugnant to the Constitution of the United States.

5. The supreme court of the State of Ohio further erred in holding and deciding that the proceeding in *quo warranto* as prosecuted and decided was not in contravention of the Constitution of the United States.

ARGUMENT.

Did the judgment of the supreme court of Ohio violate a contract between the State and the plaintiff in error and deprive said plaintiff in error of its property without due process of law?

The origin of the writ of *quo warranto* is lost in antiquity. It was recognized by statute in the reign of Edward I, and began to be supplemented by the information in the nature of a *quo warranto* in the time of Richard II.

Although a common-law proceeding, it is in vogue among all or nearly all of the United States, and the constitution of Ohio, article I, section 2, provides that the supreme court "shall have original jurisdiction in *quo warranto*, *mandamus*, *habeas corpus* and *procedendo*, and such appellate jurisdiction as may be provided by law."

The jurisdiction thus conferred by the Constitution can

neither be increased nor impaired by an act of the General Assembly.

Kent *vs.* Mahaffy, 2 O. S., 498, 499.
Logan Branch Bank, *ex parte*, 1 O. S., 433.

And the term *quo warranto*, being undefined by the constitution, must refer to that proceeding as defined by the common law. Thus the provision in section 10 of the bill of rights to the constitution of Ohio, which provides that "in any trial in any court, the party accused shall be allowed to appear and defend in person and with counsel * * * and to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed," has been construed by the supreme court of Ohio to only apply to those offenses in the trial of which the accused was entitled to a jury at the common law.

Inwood *vs.* State, 42 O. S., 186, 189.

So, too, referring to the writ of *habeas corpus*, the supreme court of Ohio, speaking through the illustrious Judge Ranney, said:

"In what does the privilege of this great bulwark of personal liberty consist? The constitution furnishes no answer, nor was it necessary that it should. If ages of uninterrupted use can give significance to language, the right of jury trial and the *habeas corpus* stand as representatives of ideas as certain and definite as any other in the whole range of legal learning" (Work *vs.* State, 2 O. S., 296, 302).

So, too, in State *vs.* Baughman, 38 O. S., 455, 459, it was held that in a proceeding in *quo warranto* the supreme court had no power to decide any questions of law collateral to the issue of the title to the offices in question, and it was said:

"It" (the supreme court of Ohio) "is by the organic law a court of limited original jurisdiction. By art. IV, sec. 2,

its original jurisdiction is expressly limited to *quo warranto, mandamus, habeas corpus* and *procedendo*.

"The sole office of a judicial proceeding by *quo warranto* in such case is to inquire by what authority these defendants are exercising the functions of police commissioners. A decision on any of the questions suggested, not necessary to a determination of the right of defendants to exercise these functions, would not be a judicial settlement of such questions, but would be without the authority conferred by the constitution to make it."

And, again, in the case of Randall *et al. vs.* The State *ex rel.*, decided January 22, 1901 (45 W. L. B., 163, 165), our supreme court, construing an identical section of the constitution of Ohio conferring original jurisdiction upon the circuit court, said:

"Jurisdiction in *mandamus* is conferred upon the circuit court by section 6, article IV of the constitution, and that jurisdiction cannot be abridged or taken away by the General Assembly."

The constitution of Ohio, so far as it need be further quoted for the purposes of this case, contains the following provisions:

Art. III, sec. 26. "All laws of a general nature shall have a uniform operation throughout the State."

Art. XIII, sec. 1. "The General Assembly shall pass no special act conferring corporate powers."

Art. XIII, sec. 2. "Corporations may be formed under general laws; but all such laws may from time to time be altered or repealed."

The statutes passed in conformity with these provisions and effective at all times during the existence of the plaintiff in error permit any five persons to form a corporation for any purpose for which individuals might lawfully associate themselves, excepting professional business, and with

some restrictions upon corporations organized exclusively for dealing in real estate.

Rev. Stat. (Ohio), sec. 3235.

Such incorporators are required to file with the secretary of state a paper setting forth the name of the corporation, the place where its principal place of business is to be located, the purpose for which it is formed, and the amount of its capital stock.

Rev. Stat. (Ohio), sec. 3236.

"Upon such filing of the articles of incorporation, the persons who subscribed the same, their associates, successors, and assigns, by the name and style provided therein, shall thereafter be deemed a body corporate, with succession, and power to sue and be sued, contract and be contracted with, acquire and convey at pleasure all such real or personal estate as may be necessary and convenient to carry into effect the objects of the incorporation, and to make and use a common seal, the same to alter at pleasure, and to do all needful acts to carry into effect the objects for which it was created."

Rev. Stat. (Ohio), sec. 3239.

The record shows that the Capital City Dairy Company was incorporated pursuant to law, and thereupon acquired a franchise to be a body corporate, with the authority, powers, and franchises provided for in the preceding section.

The General Assembly had the power to pass laws affecting this corporation, provided they had a uniform operation throughout the State, and did not otherwise violate the constitution.

State *vs.* Nelson, 52 O. S., 88.

Coal Company *vs.* Rosser, 53 O. S., 12.

State *vs.* Iron Co. (unreported), cited in 55 O. S., 442.

It is not contended, however, that the judgment before us has any other legislative sanction than the penal statutes

above set forth, which prescribe certain penalties, under the criminal code, for their violation.

The corporation was a party to a contract with the State of Ohio; it accepted the conditions laid down by the State, including the payment of a fee to an officer of the State. As a part of that contract, we must include the constitution of Ohio.

Therefore the Capital City Dairy Company could not be deprived of its corporate franchises except in two ways:

First. By the passage so enacting of an act of the General Assembly, having uniform operation throughout the State.

Second. By a judgment in *quo warranto*, which could only be rendered by the supreme court by virtue of its limited original jurisdiction, being the same jurisdiction exercised by the appropriate courts, in *quo warranto*, at the comm[illegible] law.

It not being contended that any such law was passed by the General Assembly, the judgment under review must depend for support, if support it has, upon some principles derived from the common law.

Section 6761, Revised Statutes of Ohio, among other things, provides that an action in *quo warranto* may be brought against a corporation:

"1st. When it has offended against a provision of an act for its creation or renewal or any act altering or amending such acts.

"2nd. When it has forfeited its privileges and franchises by non-user.

"3d. When it has committed or omitted an act which amounts to a surrender of its corporate rights, privileges, and franchises.

"4th. When it has misused a franchise, privilege or right conferred upon it by law, or when it claims or holds by contract or otherwise, or has exercised a franchise, privilege or right in contravention of law."

We assume this statute is valid as declaratory of the common law. It is plain from the record before us that the first and second subdivisions of this section do not apply to the case at bar; neither do we judge that it will be contended that the third subdivision has any application.

The claim of the State of Ohio is, in legal parlance, that there was a *misuser*, and not a *surrender*, of corporate franchises by the Capital City Dairy Company. The statute distinguishes these two grounds of jurisdiction in *quo warranto*, well known to the common law.

High on Ex. Rem., sec. 666.

The fourth subdivision authorizes a proceeding in *quo warranto* against a private corporation when:

(*a.*) It has misused a franchise, privilege, or right conferred upon it by law.

(*b.*) Or when it claims, or holds by contract, or otherwise, or has exercised a franchise, privilege, or right in contravention of law.

These two offenses thus denounced are respectively distinguished as a "misuser" of a corporate franchise and as a "usurpation" thereof.

"A corporate franchise is a species of incorporeal hereditament, in the nature of a special privilege or immunity, proceeding from the sovereign power, subsisting in the hands of a body politic, owing its origin either to express grant or to prescription, which presupposes a grant."

High on Ex. Rem., sec. 648.

The existence of a corporate franchise presupposes the existence of a corporation.

It is true that at the common law and in Ohio under the former constitution the corporation was often created and endowed by the same statute, grant, or charter. Such in-

strument was construed as a contract between the State and the body corporate. The powers and franchises of the corporation were defined therein and suitable penalties were often prescribed for their abuse, which were held to be exclusive of the death penalty by *quo warranto*.

State *ex rel. vs.* Bank, 10 O. S., 535, 539.

If it is sought by the petition in the supreme court of Ohio to charge any "usurpation" of a franchise, the franchise referred to must be the right to manufacture and sell colored and unlabeled oleomargarine, and the right to refuse to sell and deliver the same for analysis.

These matters could not constitute franchises in the State of Ohio, for the General Assembly could not pass any law permitting any corporation to do these things without first repealing the statutes, still effective, denouncing them as violations of law, for, as we have seen, "all laws of a general nature shall have a uniform operation throughout the State," and "no special act shall be passed conferring corporate powers."

It is, therefore, clear that if the plaintiff in error made and sold colored and unlabeled oleomargarine and refused to deliver it to an inspector for analysis, it thereby "usurped" no corporate franchise.

Indeed, the test is this: Whenever a corporation can be proceeded against for usurping a franchise, then *quo warranto* will lie against an individual, or a collection of individuals, for usurping such corporate franchise if they do or attempt to do the same things.

State *ex rel.* Ackerman, 51 O. S., 163.
Spelling on Ex. Rel'f, sec. 1806.

But if John Smith refuses to furnish a sample of oleomargarine to an inspector for analysis, or colors it, or fails to label it, he may commit a crime, but he does not usurp a

franchise. The State's remedy against him is by indictment.

Bates' An. Stat. (Ohio), 4200–8, *et seq.*
State *ex rel. vs.* C. C. Dairy Co., 62 O. S., 123, 126.

It is evident that any corporate franchise which cannot be "usurped" cannot exist, and by analogy cannot be subject to misuser, and therefore the violation of penal statutes regulating the manufacture and sale of oleomargarine, as charged in the petition in *quo warranto*, did not constitute an "abuse" of corporate franchises by the Capital City Dairy Company.

The distinguishing attribute of a corporate franchise is very clearly pointed out by the supreme court of Louisiana in Crescent City Gas Light Company *vs.* New Orleans Gas Light Company, 27 La. Ann., 138, 147, cited with approval by Mr. Justice Harlan, in delivering the opinion of this court in the case of New Orleans Gas Light Company *vs.* Louisiana Light Company, 115 U. S., 659:

"The right to operate gas works and to illuminate a city is not an ancient or usual occupation of citizens generally. No one has the right to take up the streets, lay down gas pipes, erect lamp posts, and carry on the business of lighting the houses and streets of New Orleans, without special authority from the sovereign. It is a franchise belonging to the State, and in the exercise of the police power, the State could carry on the business itself, or select one or several agents to do so."

Conversely, it is apparent that the right to make and vend butter or any similar food is an ancient and usual occupation of citizens generally, requiring no invasion of public rights and calling for no special authority from the sovereign power. It is not a franchise belonging to the State, and the business itself could not be carried on by the State or by agents selected by the State without usurping functions

peculiarly belonging to the individual, and entirely without necessity for governmental ownership or control.

"The common-law *quo warranto* information, as we have it today, is substantially as left by the changes and modifications made by the statute of Anne, 9 Anne, c. 20. The scope of the remedy furnished by it is to forfeit the franchises of a corporation for misuser or non-user. * * *

"It is also necessary to notice the distinction frequently overlooked between *franchises* and *powers*. The definition of a franchise given by Finch, adopted by Blackstone and accepted by every authority since, is 'a royal privilege or branch of the King's prerogative, subsisting in the hands of a subject.'

"To be a franchise, the right possessed must be such as cannot be exercised without the express permission of the sovereign power—a privilege or immunity of a public nature, which cannot be legally exercised without legislative grant. It follows that the right, whether existing in a natural or artificial person to carry on any particular business, is not necessarily or usually a franchise. * * * The only franchise which such corporations possess is the general right to be or exist as a corporation."

State *vs.* Minnesota Thrashing Co., 40 Minn., 213, 225.

"To determine whether proceedings will lie against the exercise of privileges claimed to be established as matters of *publici juris* by statute, inquiry must be directed to two questions: (1) Has the legislature prohibited its exercise by citizens generally either with or without condition; and if it has (2) were the evils in view as a reason for the prohibition of a public or private character?

"There are many prohibited acts which a person may do every day and thereby subject himself to severe penalties, the doing of which however will not authorize a *quo warranto* proceeding. This is so evident as to require no illustration."

Spelling on Ex. Rel'f, sec. 1806.

Our contention, briefly stated, is this:

1st. There was no misuser or usurpation of any corporate franchise stated in the petition.

2d. The exclusive remedy against the plaintiff in error for the acts of commission and omission charged in the petition was by indictment.

3d. Whatever validity the judgment of the supreme court of Ohio may otherwise have, it is invalid so far as it places the property of the corporation in the hands of trustees, thereby taking it from those entitled to its possession without due process of law.

The recent case of The New Orleans Debenture Redemption Company of Louisiana, Limited, *et al. vs.* Louisiana, decided by this court on February 25, 1901, does not, in our opinion, militate against the proposition last above stated.

In that case it was held that upon judgment annulling the corporation it was proper to enjoin the officers from acting as a corporation. In the opinion delivered by Mr. Justice Peckham, it is expressly stated that the injunction left the property of the corporation to be dealt with according to law, and, indeed, the supreme court of Louisiana reversed that portion of the judgment of the trial court which placed its property in the hands of a trustee or liquidator, and "left the whole question open in regard to such appointment," and in the opinion of this court it is further stated:

"There has been no taking of any property belonging to shareholders, and whatever may be done hereafter, whether by liquidator or receiver, can only be done upon notice to them as parties to the action and after full hearing of their claims."

Neither do we believe that this case militates against our contention that the supreme court of Ohio had no power to oust the plaintiff in error from its corporate franchises, even though it might be guilty of violating some penal statute.

In the Louisiana case it was held that the corporation was not created for a lawful purpose; and in the opinion of this

court it is said, referring to such corporation, that "if not created for a lawful purpose, the company was not created at all. It is not a question of the right to do certain business after it was authorized by the State to organize as such corporation. Its legal creation depended upon the lawful character of the work it is organized to do * * * the State having the right to say upon what terms and upon what conditions, it will grant the right of incorporation; it must have the right to determine, through its courts, whether these conditions have been complied with."

Indeed, in that case, the State steadily denied that the corporation was anything more than a *de facto* corporation.

When the supreme court of Ohio pronounced judgment of ouster from its corporate franchises against the Capital City Dairy Company its power was exhausted (Society Perwn *vs.* Hay, 43 O. S., 481). *The property then belonged to the shareholders of said corporation, subject to the rights of the creditors. If there were no creditors the property belonged absolutely to the stockholders, and they were entitled to divide it up among themselves in any way they saw fit.*

The State had no more power to seize their property and hand it over to a couple of trustees, upon judgment of ouster, than it had before such judgment was pronounced. Indeed, from a logical point of view, no trustee could become necessary until the corporation ceased to exist. When the corporation ceased to exist no party was before the court and no order could be legally made affecting such property, unless the owners thereof had their day in court.

That the appointment of such trustees would be a taking of property, and might be a wanton injury to any going concern, is forcibly illustrated by the opinion of Holman, J., in Havemeyer *vs.* Superior Court, 84 Cal., 327. Indeed, it is safe to say that any company would rather have its entire plant destroyed by fire or storm than to have it subjected to the ministrations of a trustee.

In deciding the case of Havemeyer *vs.* Superior Court,

supra, the supreme court of California reversed the order of the superior court placing the American Sugar Refinery Company in the hands of a receiver as a part of the judgment in *quo warranto*.

The supreme court held that there was no statute authorizing such appointment, and found it to be illegal and improper, and made absolute its alternative writ of prohibition.

On page 378 it is said:

"When a corporation is dissolved, its property, as we have seen, vests in its stockholders, subject only to the claims of creditors, and is thereafter held upon the same tenure and subject to the same conditions as similar property owned by other natural persons. What others may do, they may do. They owe no further or higher duty to the public, and are under no other restraints. Therefore, unless some ground can be shown upon which the State can take a sugar refinery away from a private citizen, who has inherited it, or bought it, or built it, and can shut it up preparatory to dividing and scattering it, upon the ground that he has entered into an agreement with some other private citizens, owning another sugar refinery, to limit the output of both establishments with a view to keeping up the price of the refined product, no ground can be shown which will warrant the State in taking similar property from natural persons, who have succeeded thereto on the death of a corporation."

And again on page 369:

"Because a corporation has violated its duty to the public, it does not follow that its members cannot be trusted to look out for their own interests. Quite the contrary; for it is usually too exclusive regard for their own interests that constitutes their dereliction to the public. As to creditors, their interests must, in most cases, be opposed to the appointment of a receiver; they will be paid more quickly and more certainly without a receiver than with one. If there is any one thing more certain than another, it is that the appointment of a receiver implies a material diminution of the funds out of which creditors are to be paid, for, in the first place, the fees of the receiver, his counsel, and assistants are to be sub-

stracted, then the estate must, in many cases * * * be condemned to unproductive idleness and disuse, and exposed to danger of loss and dilapidation from rust and decay, during the long and tedious progress of the legal proceedings that are necessarily entailed.

"And all this time, the creditors must wait and look on, while the fund, upon which they rely, is being depleted by the process above referred to. On the other hand, supposing the affairs of the defunct corporation to be under the control of its late directors, as trustees for its creditors and stockholders, the creditors have nothing to do but present their demands and receive payment in the ordinary course of business, or if payment is refused or delayed, they may proceed to enforce their demands.

"How much better this is for the creditors than to have to wait upon the motions of a receiver and the court, under whose order he acts, every one knows who has had experience of the two methods of settling the business of a partnership or a corporation."

In our case, for example, plaintiff in error had no creditors and but few shareholders, all of whom were closely connected by many ties of friendship, acquaintance, and affinity. They could and can divide their property to their own satisfaction in thirty seconds. They could and can, if necessary, deposit any sum of money and give bond in any amount for the protection of any imaginary creditors, for no real creditors exist. Every dollar paid out of this estate to trustees, attorneys for trustees, court officers, and the like, is money taken from the pockets of these men, without their consent, not for their benefit, and is, we claim, without due process of law.

The principle for which we are contending is well stated by Mr. Spelling in his treatise on Extraordinary Relief, section 1881, as follows:

"The judgment against a corporation for a violation of its charter must be confined to a seizure of its franchises. It cannot be extended to a seizure of the property of the corporation. The ownership of the corporation continues until

its dissolution, and the judgment of seizure of franchises, as we have seen, does not work a dissolution. Nothing is forfeited to the State, except that which came from the State originally; namely, the franchises and liberties usurped or abused by the corporation. Nor as part of the judgment upon *quo warranto*, has the court power, in addition to dissolving the corporation, to appoint a receiver of its property without the consent of the stockholders. When the court has adjudged that such body be excluded from the right to exercise the franchise of a corporation, it has exhausted its jurisdiction over the subject-matter of the controversy before it."

"While it is competent upon judgment against a corporation, on a *quo warranto* information for a violation of its charter to award that the privileges, liberties and franchises of the corporation be seized into the custody of the State, it is error to award that the goods, chattels, credits and effects of the respondent be seized into the custody of the State. The ownership of the corporation does not terminate until its dissolution, and the better doctrine is, as we have already seen, that the judgment of seizure does not of itself work a dissolution. Hence nothing is forfeited to the State but the corporate franchises and liberties, which came from the State originally.

High on Ex. Leg. Rem., sec. 755.

The same doctrine was forcibly upheld by the supreme court of Indiana in the case of State Bank of Indiana *vs.* The State of Indiana, 1 Blackf., 267, 281, as follows:

"There are but two grounds on which it can be contended that the corporate effects fall into the hands of the State: 1st, as a forfeiture for abusing franchises; 2dly, for the want of an owner by the dissolution of the corporation. When we examine the first of these grounds, we find nothing in the books to support an idea that the abuse of corporate franchises occasions a forfeiture of lands or goods, rights or credits, or in fact occasions any other forfeiture but the franchises itself. The consequence of the breach of the implied condition on which their liberties were granted was not that they should forfeit their property or possessions if they abuse their franchises, but only that they should forfeit the franchises. That which comes out of the hands of the King is

the proper subject of forfeiture; the King, by the seizure securing what originally flowed from his bounty. Authorities leading to this conclusion are numerous. See the cases cited in 2 Bac., 32, and in the King *vs.* Amery, 2 T. R., 515. For the forfeiture is the same for non-user, when no property has been held or rights exercised, as for misuser or abuser, after the possession of much property and the exercise of extensive rights and credits; and the judgment is the same in both cases. Consequently, the judgment could not direct a seizure of the corporate possessions, as a forfeiture for the violation of the charter. Nor, is the second ground—that the property falls to the State for want of an owner, on the dissolution of the corporation—more tenable as a foundation on which to sustain this judgment.

"For the ownership does not cease until its dissolution. And whether it is dissolved by the judgment of seizure or not, until the State has execution on that judgment, it is not here very material. For, if the corporation is dissolved by the judgment, the judgment must be regularly entered and have its full effect before the dissolution takes place; and it is not until then, that the corporation can be said to be without an owner. The loss of the property to the corporation is a consequence of the judgment; and it is a contradiction of the first principles of reason—a complete reversal of effect and cause to make said loss of property a part of the judgment. That which cannot exist, until after the judgment, can never be the subject-matter on which the judgment is given. But the better opinion seems to be that the corporation is not dissolved by the judgment of seizure, but that it exists until the franchises are seized by execution on that judgment. See 2 Kyd. on Cor., 409, 10, and the authorities there cited. Consequently, the last shadow of a support for this judgment, on this ground must vanish."

At the common law, upon dissolution of a corporation its lands reverted to the donor, its privileges and franchises were extinguished, and the members could neither recover debts that were due the corporation nor be charged with debts contracted by it in their natural capacities. The chattel property probably went to the Crown, but there was so little value attached to personal property at the common

law that it seems as though no express rule had ever been laid down concerning its disposition.

In this country, however, for at least a century past, the ancient doctrine did not prevail in these respects, but the title to corporate property, upon dissolution or otherwise, vested in the shareholders or the directors or trustees representing them.

In People *vs.* O'Brien, 115 N. Y., 1, after the dissolution of a corporation the attorney general, under the statute, brought a suit to appoint a receiver for said defunct corporation, and the court said:

"As we have seen, the property of this corporation vested in the persons who were its directors at the time of the dissolution. They took it as trustees for the stockholders and creditors and were not made parties to the action in which the receiver was appointed. No legislature can authorize the appointment of a receiver of the property of A in an action against C, without violating the provisions of the Constitution relating to the taking of property without due process of law."

People *vs.* O'Brien, 115 N. Y., 1, 63.

Mr. Morawetz, in his work upon the Law of Corporations, states the rule as follows:

"The judgment rendered in a proceeding of *scire facias* and information in the nature of a *quo warranto* against a corporation can reach only the corporate franchises; these may be declared extinguished; but property rights cannot be confiscated by the State or prevented from devolving according to the ordinary rules of equity and the common law."

Morawetz on Corporations, sec. 1033.

And Mr. Justice Miller, speaking for this court, in deciding the case of Greenwood *vs.* Freight Company, 115 U. S., 13, where a corporation had been dissolved by a legislative repeal under a provision of the law of Massachusetts sim-

ilar to that contained in the constitution of Ohio, took occasion to say:

"Personal and real property acquired by the corporation during its lawful existence, rights of contract or choses in action so acquired, and which do not in their nature depend upon the general powers, conferred by the charter, are not destroyed by such a repeal; and the court may, if the legislature does not provide some special remedy, enforce such rights by the means within their power. The rights of the shareholders of such a corporation to their interest in its property are not annihilated by such a repeal, and there must remain in the courts the power to protect these rights."

Greenwood *vs.* Freight Co., 115 U. S., 13, 19.

Although the highest courts of Indiana and Mississippi at one time inclined to the theory that the ancient doctrine in all its rigor applied to corporations in America after dissolution, there can now be no question but that the common law of this country is correctly expressed by Mr. Justice Peckham, speaking for this court in the case of Lake Shore, etc., Railway Company *vs.* Smith, 173 U. S., 684, 698:

"To terminate the charter and thus end the legal life of the company does not take away its property, but on the contrary leaves it all to the shareholders of the company, after the payment of its debts."

The same doctrine is repeated in various forms by so many authors and judges that any attempt at exhaustion could only be a matter of subjective satisfaction.

In Hill *vs.* Glasgow R. Co. *et al.*, 41 Fed. Rep., 610, 617, Mr. Justice Jackson, then circuit judge, among other things, said:

"After the payment of debts, corporate assets belong and must be distributed equally and ratably among the stockholders therein, as the beneficial owners thereof. This equality of ownership and right of ratable distribution in surplus assets of the corporation, acquired before amendment or repeal of the company's charter, cannot be defeated or in-

paired by such amendment or repeal. *It is a valid right of property, which does not fall within the power to deal with the privileges and franchises of the corporation.*"

And *In re* Opinion of the Justices, reported in 66 New Hampshire Reports, 596, there will be found a most exhaustive treatise upon these and kindred subjects, from which we briefly quote:

"The beneficial ownership of trust funds cannot fail for want of trustees. As vested rights of an equitable character cannot be divested by the death of administrators or other natural persons, who hold property in trust, so the equitable title of the stockholders of an incorporated business company cannot be lost by the termination of the trustee's corporate life. The dissolution of the corporate trustee, by the repeal, forfeiture, surrender or expiration of the charter, does not convey the corporate property to the State, nor enlarge or diminish the constitutional power of the State to become the owner (2 Kent Com., note *b;* Folger *vs.* Columbian Ins. Co., 99 Mass., 267, 277; Thornton *vs.* Railway, 123 Mass., 32, 34; Burrell *vs.* Railroad, 75 N. Y., 211, 216; State *vs.* Bailey, 16 Ind., 46, 52; Mumma *vs.* Potomac Co., 8 Pet., 281; Curran *vs.* Arkansas, 15 How., 304, 310, 312; Bacon *vs.* Robertson, 18 How., 480, Lum *vs.* Robertson, 6 Wall., 277; Broughton *vs.* Pensacola, 93 U. S., 266, 268; Church of Jesus Christ, etc., *vs.* United States, 136 U. S., 1, 47; 150 U. S., 511; authorities cited in 59 N. H., 171; Mor. Corp., ss. 1031–1033; Field Corp., s. 491; Dill. Mun. Corp., s. 169; Pierce R. R., 13; Cook Stock., s. 638; Wait Insolv. Corp., ss. 347–349). An amendment of the charter can have no more confiscating effect than a repeal.

"The stockholders of a business corporation are partners, with rights and liabilities fixed by the general or special law, which is a part of their contract. When their corporate union is dissolved, by repeal or otherwise, there is a tenancy in common, as there is after the dissolution of an unincorporated partnership (133 U. S., 59; 145 U. S., 356). After three years, allowed for winding up by the use of corporate powers limited to that purpose (G. L., c. 147, s. 17), undivided capital is divisible by agreement of the owners or by legal process without the exercise of corporate power. The contention that the property of a dissolved corporation is forfeited rests wholly upon what is claimed to be the neces

sary consequence of the extinction of corporate life. We do not think the dissolution of a corporation works any such effect. It would not naturally seem to have any other operation upon its contracts or property rights than the death of a natural person upon his."

The general doctrine we are contending for has always been fully recognized in Ohio, and by statute it is provided that a dissolved corporation may sue and be sued in its corporate name; that judgments for or against it may be revived; that error may be prosecuted in favor of or against it and by its corporate name "in the same manner and with like effect as if it were not dissolved;" that the directors at the time of dissolution may settle the affairs of the corporation, and also that the directors of any corporation may appoint three trustees to wind up its affairs, and that "a majority in interest of the stockholders may remove a trustee or appoint a person to a vacancy occasioned by the death, resignation, or removal of the trustee."

It will be asserted, however, that the action of the supreme court of Ohio in appointing trustees to wind up the affairs of the plaintiff in error was for the purpose of "preserving" the corporate assets for the stockholders, and was simply a necessary incident to the judgment.

It is true that in the chapter devoted to proceedings in *quo warranto* there is found section 6781, under favor of which the supreme court may have acted, which reads as follows:

"The court rendering a judgment dissolving a corporation shall appoint trustees of the creditors and stockholders of the corporation, who, after giving an undertaking payable to the State of Ohio, in such sum and with such sureties as the court may designate and approve, conditioned that they will faithfully discharge their trust and properly pay and apply all money that may come into their hands, shall have power to settle the affairs of the corporation, collect and pay outstanding debts, and divide among the stockholders the

money and other property which remain after the payment of debts and necessary expenses."

This statute must be construed so as to give it a reasonable effect and to uphold its validity. The word "shall" should be read as "may," and in that event we are bound to infer that the legislature contemplated that the supreme court would not appoint such trustees without notice to the owners of the property, and without some showing which would justify their property being put in the hands of a trustee or receiver by a court of equity.

It cannot be contended that this statute increases the power of the supreme court or confers any additional power upon it; but it may be argued that there can be no valid objection to the court, upon dissolution of the corporation, appointing trustees or receivers for its assets, where creditors or stockholders desire the same to be done, thereby avoiding circuity of action, multiplicity of suits; but if there be, under the circumstances of any particular case, no power or jurisdiction to appoint a receiver, if the owners of the property are given no notice or opportunity to be heard, such appointment is invalid, and any statute which sustains it is a legal nullity.

In the case at bar the trustees were appointed in the same journal entry, which decided the case and dissolved the corporation. The record does not show that any condition of affairs existed which justified placing the property of this corporation in the hands of trustee. After the corporation ceased to own it, it then became the property of the shareholders, subject to the lien of the creditors. If there were no creditors, then it became absolutely the property of the stockholders, and they might divide it among themselves or convey it to one of their number, or otherwise dispose of it as they saw fit.

In Ohio it is elementary, on dry land at least, that to place an officer of the court in possession of property, with author-

ity to sell and dispose of it, is the taking of property without due process of law, if no jurisdictional fact exist to justify such action and no notice is served on the owner or a showing made why it cannot or should not be served upon him, or why, through his conduct or misconduct, his domicile or lack of domicile, his property should be subjected to a purely *in rem* procedure.

The fact that the shareholders may get what the trustees overlook in charging their fees and expenses does not answer the objection. They (the stockholders) should not be relegated to the residue; they are entitled to all of the property.

It may be claimed that the creditors and stockholders did not intervene in the supreme court of Ohio, and are not prosecuting error in this court. They had no opportunity to intervene; they were not proper parties to that suit, at least, until after dissolution, and the very moment the dissolution was pronounced, *in eo instanti*, the trustees were appointed.

Neither could they come into the case and ask for a rehearing of the case. A motion for a rehearing can only be made by one of the judges who concurred in the decision.

Moreover, by virtue of the writ of error and supersedeas allowed by the chief justice of the supreme court of Ohio, the plaintiff in error is permitted to ask in this court that said judgment of the State court be reversed or modified. It is still sufficiently an entity to have a standing in this court, and, as a trustee for its creditors and stockholders, to protest against any invasion of their rights.

Should the judgment of the supreme court of Ohio be reversed and the plaintiff in error restored to all things it has lost thereby, then the stockholders and creditors were and are unnecessary and improper parties either here or in the court below.

Should this court, however, find the judgment awarded by the supreme court of Ohio to be otherwise valid, it may

reverse said judgment in part, so as to permit the judgment of dissolution to stand, and leave the corporate assets to be hereafter administered by trustees, if any creditor or stockholder desires that to be done; otherwise to remain in the possession and control of the persons who own it.

"It would seem that the judgment may be good in part, and bad in part, and in such case it will be affirmed as to the part held good, and reversed as to the residue. Thus, when judgment of ouster was rendered, together for judgment for costs, under the statute of Anne, and the court was of opinion that the case did not fall within the statute as to costs, that part of the judgment was reversed, and the judgment of ouster was sustained, being held good as a common-law judgment."

High on Ex. Rem., sec. 749.

ARE THE STATUTES WHOSE VALIDITY IS UPHELD BY THE SUPREME COURT OF OHIO REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES?

For reasons that will sufficiently appear hereafter, we prefer to discuss, in a separate subdivision of this brief, the validity of section 4 of the act of May 16, 1884 (81 O. L., 67); (Bates' An. Stat. (Ohio), sec. 4200–7).

This statute is a part of a general law providing against the adulteration of food and drugs in the State of Ohio, and has no especial application to oleomargarine. The remaining statutes all relate to the adulteration of dairy products and are aimed almost exclusively at oleomargarine.

These statutes are described in the syllabus to the opinion of the supreme court of Ohio as the "acts of March 7th, 1890 (87 O. L., 51), and of May 16th, 1894 (91 O. L., 274), and of May 17th, 1886 (83 O. L., 178), as amended March 21st, 1887 (84 O. L., 182)." (See printed Record, p. 19, 62 O. S., 350); and, in the opinion of the court, as Bates' An. Stat., sections 4200–'13, '14, and '30. (See printed Record, p. 21, 62 O. S., 360.)

They form an integral part of the system of laws relating

to the manufacture and sale of oleomargarine in the State of Ohio, and it may not be unimportant to trace their history so as to arrive at their true meaning and intent.

By section 7090 of the Revised Statutes of Ohio (which said Revised Statutes were passed as one act on January 1, 1880), it was provided that no one, under penalty of fine or imprisonment, or both, should knowingly sell, or offer for sale, "any substance purporting to be butter or cheese, or having the semblance of butter or cheese," which substance was not made wholly from pure cream or pure milk, unless each package of such substance should be distinctly and durably painted, stamped, or marked thereon with the name of each article used, or entering into the composition of such substance.

The validity of this statute was upheld by the supreme court of Ohio in the case of Palmer *vs.* The State, 39 O. S., 236. The word oleomargarine does not appear in this statute, and the object of the legislature at the time in passing the act, as found by the supreme court of Ohio, in construing it, was to guarantee to those buying food "the means of judging for themselves as to its quality and value."

On April 26, 1881, a supplemental statute was passed, appearing in the Revised Statutes as 7090*a*. No purpose was stated in the title for passing the act, which reads as follows:

"Whosoever shall mix or compound in any form, any portion of the oleaginous parts of the horse, hog or dog, in any substance called butter, and shall sell or offer for sale such compound, as butter, shall be deemed guilty of a misdemeanor, and on proof of same shall be fined not less than $50.00 nor more than $500.00, or be confined in the county jail not less than thirty nor more than one hundred days, or both, at the discretion of the court."

On April 13, 1881, an act had also been passed by the legislature of Ohio entitled "An act to amend sec. 7090 of

the Revised Statutes of Ohio," which forbade the manufacture and sale of any substance in imitation of butter, which substance was not wholly made from pure cream and milk and salt, unless manufactured under its true and appropriate name, with each vessel containing one or more packages of such substance distinctly and durably painted, stamped, and marked thereon with the name of such substance, together with the name of each article used or entering into its composition, under penalty of fine or imprisonment, or both, at the discretion of the court.

Up to this time the word *oleomargarine* nowhere occurs in the statutes of Ohio, and butter, so far as defined at all, is defined to be a substance made wholly "from pure milk or cream and salt." *Butter otherwise made is forbidden to be sold, except appropriately labeled with its name and the ingredients composing it. Coloring matter had not then become an essential constituent of "natural" butter.*

No further legislation is found in Ohio until April 27, 1885, when an act was passed entitled "An act to prevent the manufacture and sale, as butter, of oleomargarine, and other similar substances."

This statute provided that no person should manufacture out of any oleaginous substance or substances, or any compound of the same other than that produced from unadulterated milk or cream from the same, any article designed to be sold as butter or cheese produced from pure, unadulterated milk or cream of the same, or should sell or offer to sell the same as an article of food; but the act then went on to provide that nothing therein should be construed "so as to prevent the manufacture and sale of oleomargarine when manufactured from beef suet and milk."

In the following year a more elaborate law was passed, which repealed the one we have last quoted, and undertook to provide generally for the manufacture and sale of dairy products. It, however, substituted no definition for the word oleomargarine, and, indeed, did not use the word at all. It

prohibits the manufacture and sale of "any substance purporting, appearing or represented to be butter," or, "having the semblance of butter," and which is not wholly made from "pure milk, or cream, salt, and harmless coloring matter," unless labeled when sold. It also provides for signs to be used at hotels where any substance is served "which appears to be, resembles, or is made in or as an imitation of, or is made as a substitute for butter, under whatsoever name." This sign must contain the words "imitation butter."

This law deserves careful attention because it repeals the definition of oleomargarine made in the preceding year. *It also, for the first time, describes harmless coloring matter as a constituent of butter.* It is likewise remarkable in not containing, throughout its entire length, the word *oleomargarine.*

This law was, in some respects, amended by the act of March 22, 1887 (84 O. L., 182). The amendments, for the purpose of this discussion, are not very important, except that the word "oleomargarine" is substituted for the words "imitation butter," in the sections requiring signs to be displayed where so-called "imitation butter" is served or sold. The act, by its title, purports to be passed in order "to prevent adulteration and deception in the sale of dairy products."

Before proceeding to recite the provisions of the act of March 7, 1890, and to determine their meaning, it is well to remember that oleomargarine, at the time of its passage, was not in any way defined or described by any statute in the State of Ohio; neither did any law exist regulating the manner or mode of making it; neither were there any restrictions upon its sale if certain conditions, as to signs and labels, were complied with.

This law was entitled "An act to prevent deception in the sale of dairy products and to preserve the public health." It defined butter to be the product usually known by that term, "and which butter is manufactured exclusively from

pure milk or cream, or both, with salt, and *with or without any harmless coloring matter.*"

Its first section (now assembled in Bates' Annotated Statutes as section 4200–13) absolutely prohibited, under heavy penalties, the manufacture for sale "out of any animal or vegetable oils, not produced from unadulterated milk or cream from the same, any article in imitation or semblance of natural butter," or the combining with or addition to milk, cream, or butter of any animal fats or animal or vegetable oils not produced from milk or cream so as to produce any article or substance or any human food in imitation or semblance of natural butter. By its terms it seemed to altogether prohibit the manufacture of oleomargarine. In the succeeding section, however, it was provided that nothing in the act should be construed "to prohibit the manufacture or sale of oleomargarine, in a separate and distinct form, and in such a manner as will advise the consumer of its real character, free from any coloring matter or other ingredient causing it to look like or appear to be butter."

It is clear that the legislature intended, by passing this act, to prohibit all artificial food products in imitation or semblance of butter, except oleomargarine.

This act supplanted the act of 1886, as amended in 1887, so far as the former law related to "imitation butter." The former law permitted "imitation butter" to be freely sold if certain conditions were complied with; it made no distinction for or against oleomargarine. The act of 1890 evidently desired to prohibit all compounds which were intended to be used as food and which might resemble or appear to be butter.

In passing this act, however, the legislature no doubt had in mind the act of Congress approved August 2, 1886, regulating and taxing oleomargarine. This law recognized oleomargarine as an article of commerce.

The legislature no doubt appreciated that it could not prohibit the importation of this substance in Ohio. It no

doubt was familiar with the provisions of the Federal law and knew that it contained stringent provisions looking to the cleanliness and healthfulness of oleomargarine and the constituents entering into it. While, therefore, the legislature must have known that oleomargarine was manufactured from compounding animal oils with milk or cream, or both, and therefore within the letter of the prohibitory provisions of section one, it disavowed any intention to prohibit the free manufacture or sale of oleomargarine, although, pursuant to the Federal law, it required the same to be made and sold in a separate and distinct form and in such manner as would advise the consumer of its real character. It undertook to go further and forbade its containing any coloring matter or other ingredient causing it "to look like or appear to be butter."

We believe that as to the last enactment the legislature exceeded its power, although this proposition is less important in view of the more radical legislation hereafter recited, upon which the State will mainly rely.

We may say, at this point, that under favor of this act oleomargarine could be freely manufactured if it complied with the conditions laid down, which were: (*a*) That it be manufactured and sold in a separate and distinct form, so as to advise the consumer of its real character, and (*b*) free from coloration or other ingredients causing it to look like "natural butter."

Under this act the manufacturer of oleomargarine was not bound to comply with the peculiar provisions as to labeling, and the like, contained in section 4200–30, cited in the opinion of the supreme court of Ohio. Had there been no subsequent legislation, the manufacturer of oleomargarine, indicted under section 4200–30, could have made a complete defense by showing that he complied fully with the spirit of the statute now known as 4200–14, and it would cut no figure whether he had "gothic" letters or "pica"

letters upon the label, or whether he did or did not comply with the literal provisions of section 4200–30.

This plainly appears by the fact that subsequently, in 1894, another act was passed defining oleomargarine and providing with great particularity for signs, labels, &c.

See sec. 3, 91 O. L., 274.

As we shall hereafter see, plaintiff in error complied with the provisions of the act of 1894 in relation to labeling its product. It was not bound to also comply with the peculiar directions as to labeling contained in the act of 1886, as amended in 1887.

The act of May 17, 1886 (83 O. L., 178), did not apply. Counsel for the State were evidently misled by a hurried reading of the various statutes relating to oleomargarine, and drew their indictment under the act of 1886 instead of the act of 1894.

The third charge in the petition must therefore fail, upon an inspection of the pleadings and the statutes applicable thereto. But of this more hereafter.

In 1894 an act was passed, ostensibly to promote the public health and prevent deception, which is codified as sections 4200–16 to 4200–20. This law prohibits any one to manufacture, sell, or have in his possession with intent to sell, any oleomargarine "which contains any methyl orange, butter yellow, annatto, analine dye, or any other coloring matter." The only coloring matter used by the plaintiff in error was the coloring matter *annatto*, which is conceded to be harmless.

The constitutional question, therefore, to be resolved is whether the State has the power, under the guise of "regulating" the manufacture of a harmless food, to prohibit in its manufacture, first, any ingredient, however harmless, which may impart to it any color; second, any ingredient, however harmless or nutritious, which may cause it to resemble some other food.

We will expect to show by an analysis of the statutes themselves, their animus and practical application, that section 4200–14 and section 4200–16 were passed and are being enforced by the State of Ohio neither to promote the public health nor to protect the consumer of food from any fraud being practised upon him, but simply, exclusively, and notoriously for the purpose of injuring and destroying the business of making and selling a harmless, useful, nutritious food in order to enable the rival makers of a similar food to increase their profits by raising the price of the product they manufacture. Both products serve the same office in domestic economy, and the competition of either necessarily prevents a monopoly of the other.

We do not consider the decision in this case foreclosed by the former decisions of this court in Powell *vs.* Pennsylvania, 127 U. S., 678, and Plumley *vs.* Massachusetts, 155 U. S., 223.

These cases did not purport to lay down any new rules of law nor to interpret differently the long accepted canons of ancient law. Upon the general principles involved there was no difference between the members of the court. The judgment and dissents therefrom were predicated upon their application to the circumstances of the particular case. The same conclusions in different cases, decided many years apart, have been arrived at by this court, although in the later case, the court was unwilling to endorse many of the legal principles upon which the earlier case depended for solution.

So, too, this court, in a quite similar case, decided at different times, has arrived at opposite conclusions, because while the laws under investigation might not be on their face dissimilar, yet their practical operation, as disclosed by the record and the prevailing conditions in the community where they were effective, had become so much a matter of public notoriety that this court felt bound to declare the later act invalid, not so much because of any invalidity ap-

parent upon its face as because of the sinister ends to which it was being notoriously applied.

No task, perhaps, is more difficult than to bound by fixed lines the demarkation between the liberty of the individual and the police power of the State. The task is made the more difficult because isolated sentences, wrenched from their moorings, seem to commit the most eminent judges, at one time or another, to the verge of anarchy or to the contrary extreme of governmental socialism.

As to whether any particular act transcends the limit of governmental power and invades the rights of the individual must often be determined, and can only be determined from the circumstances of the particular case, the results that flow from it, and the evident design of the State in passing it.

For while it should be dutifully presumed that all legislation springs from a sincere desire for the public good, and that all officers charged with the administration of the laws will administer them with rigorous impartiality, universal experience in many of our States has shown that the minorities would hardly be able to preserve their liberties were it not for the courts, and, especially, were it not for the intervention of the Federal courts under the benign provisions of the fourteenth amendment.

A collection of laws passed by the legislatures of various States for the express purpose of benefiting one class of the community at the expense of another would indeed provide, in their favor, some persuasive arguments to those who doubt that "the voice of the people is the voice of God."

The supreme court of Ohio, in a recent case, wherein it declared unconstitutional an amendment to the mechanics' lien law upon the ground that it was a restraint upon the right and liberty of contract, took occasion to say that any restraint upon that right in order to be valid must appear to be for the common public welfare and equal protection and benefit of the people, "*not only to the General Assembly,*

by force of popular clamor or the pressure of the lobby, but also to the courts."

Palmer *vs.* Tingle, 55 O. S., 423, 441.

Respect must, of course, always be paid to the apparent determination of the legislature as to whether there exists any propriety or necessity for adding a new restraint upon the ancient liberties of the people, and still more deference must be paid to the State court, which agrees with the legislature in its judgment; but the limitations of the organic law still exist, and it is the duty of the courts to uphold and enforce them.

"To what purpose," said Mr. Chief Justice Marshall, in Marbury *vs.* Madison, 1 Cranch, 137, "are limitations committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if these limits do not confine the persons on whom they are imposed." And as is well stated by Judge Earl, in the Tenement House Cigar cases, 98 N. Y., 98, 124:

"A law enacted in the exercise of the police power must in fact be a police law. If it be a law for the promotion of the public health, it must be a health law, having some relation to the public health."

We will expect hereafter to show that the case of Powell *vs.* Pennsylvania and Plumley *vs.* Massachusetts, *supra*, need not be overruled in order to uphold a judgment in this case for the plaintiff in error; and before proceeding to discuss these particular cases and the fundamental principles underlying them and necessary for the proper determination of this case, we will briefly discuss the very recent case of Austin *vs.* Tennessee, 179 U. S., 343, which (we think, through a failure to carefully examine it) has been generally hailed throughout the country as a concession to the right of any State to determine its own authority to interfere with individual liberty without interference from the Federal courts.

That case, so far as relevant to our discussion, substantially decided that it was "within the province of the legislature to declare how far cigarettes may be sold or to prohibit their sale entirely, after they have been taken from the original packages, or have left the hands of the importer, provided no discrimination be used as against those imported from other States."

This court further held, and to that extent differed from the supreme court of Tennessee, that:

"Tobacco, being a legitimate article of commerce, the court cannot take judicial notice of the fact that it is more noxious in the form of cigarettes than in any other."

In the opinion of this court, delivered by Mr. Justice Brown, it is said:

"From the first settlement of the colony of Virginia to the present day, tobacco has been one of the most profitable and important products of agriculture and commerce, and while its effects may be injurious to some, its extensive use over practically the entire globe is a remarkable tribute to its popularity and value. We are equally of opinion that it cannot be classed with diseased cattle or meats, decayed fruits, or other articles, the use of which is a menace to the health of the entire community."

But on page 348, in the same opinion, it is said: "The statute is therefore upheld as a proper regulation of the public health;" not because the Supreme Court of the United States determined, as a matter of fact, that the use of tobacco was injurious, and not because the supreme court of Tennessee declared cigarettes to be "highly noxious and deleterious to health; * * * their use is always harmful, never beneficial. They possess no virtue, but are inherently bad and bad only; they find no true commendation for merit or usefulness in any sphere. On the contrary, they are widely condemned as pernicious altogether. Beyond question, their very tendency is toward the impair-

ment of physical health and mental vigor"—but because tobacco, like intoxicating liquor, is a product which is admittedly injurious to some extent to some people, and which so many believe is always injurious to all people, that each State should be allowed to determine to what extent, if at all, its manufacture or sale shall be carried on among its people.

Very slight reflection will convince us that oleomargarine belongs to no such class. There is no claim in this record that oleomargarine is not a healthful, nutritious, and desirable food. It is manufactured under the inspection and control of the Federal Government; it is used by millions of people, and it is not charged that any one was ever injured by its consumption.

The distinction between tobacco and oleomargarine as to one being possibly injurious and as to the other being entirely wholesome; as to a large section of the people believing that one should not be used on account of its injurious effects, and many persons opposing the use of the other (if they oppose it at all) merely because they are ignorant of its properties or have some sinister reason for fearing its competition, can be best illustrated, not by medical or scientific works, but by a few homely, every-day examples, which will show how closely tobacco is by popular opinion classified with intoxicating liquors, and therefore subject to the prohibitory power of the States, as contradistinguished, for example, from oleomargarine.

It is well known that many corporations refuse to employ persons who use tobacco, especially in the form of cigarettes, but no one will seriously contend that any corporation, unless it be some creamery trust, would object to employing an otherwise suitable person because he used oleomargarine.

Many churches require that their ministers entirely abstain from the use of tobacco in any form, and others discourage and perhaps prohibit such use among its members;

certainly it will not be contended that any church makes the use of oleomargarine a test for membership.

In almost every farm-house in Ohio, and, we suppose, throughout the United States, there will be found some book supposed to contain suggestions and information to guide the reader in almost all the important affairs of life. It usually contains forms for letters supposed to be written, if required, by the reader, at one time or another, in almost every situation in life. Whatever the literary excellence of these productions may be, they reflect fairly well the sentiment and opinion of the people, especially those whose lives are spent outside of the large centers of population.

In such a book will almost invariably be found a form, supposed to be followed by the reader, if a young lady, in declining an offer of marriage from a gentleman, otherwise entirely eligible, but who is unfortunately addicted to the use of tobacco.

Could such a letter be imagined if it took for its text the use of oleomargarine?

We are, therefore, certain that this court, in upholding the statute of Tennessee upon the sole ground that there could be no "reason to doubt that the act in question is designed for the protection of the public health," did not commit itself to any prohibitory power of the States as to oleomargarine.

Indeed, on page 347 of the opinion, Mr. Justice Brown, speaking for the court, says:

"How far such laws could be made applicable to articles admitted to be innocuous has never been decided by this court."

The acts of March 7, 1890, and of May 16, 1894, which were enacted after the decision by this court of Powell *vs.* Pennsylvania, *supra*, have in their title an assertion that the act is passed, among other things, "to promote public health."

That this vestibule of the statutes is a mere pretext for their enactment may be gathered from their inspection. The statute of 1890 permits the manufacture and sale of oleomargarine without any other limitation than that it shall be sold in separate form and free from any attempt to resemble butter. It thereby in substance admits the wholesomeness of oleomargarine, for it would be equally unhealthy whether it did or did not resemble butter.

The only part of the act of 1890 which squints in the direction of the public health is that provision of section 1, now 4200–13, which prohibits the use of acids or deleterious substances in certain oleaginous mixtures therein described.

None of these, however, are supposed by the legislature to be "oleomargarine," *by which it undoubtedly meant oleomargarine as defined by the act of Congress*, and which it permits to be freely made and sold so long as it does not resemble butter.

The act of May 16, 1894, provides for oleomargarine being labeled in stores, hotels, boats, etc.; defines it to mean, "any substance not pure butter * * * made as a substitute for, in imitation of, or to be used as butter," and imposes a fine for violations of the law, and forbids the manufacture or sale of any oleomargarine "which contains any methyl orange, butter yellow, annatto, analine dye, or any other coloring matter."

If this act has any relation to the public health, it must be to the extent that it forbids any harmful, injurious, or poisonous coloring matter to be used. It could not for that reason prohibit the use of any coloring matter, because it is stated over and over again, in statutes left unrepealed, that *butter may be made "with or without harmless coloring matter."* The legislature, therefore, knew that some coloring matters were harmless. It could not, in the same act, declare that, as a health measure, oleomargarine should not contain any harmless coloring matter and that butter should. It is difficult to understand how the public health can be promoted by declar-

ing that harmless coloring matter shall be used in butter and shall not be used in oleomargarine.

The Pennsylvania statute had one mark of apparent honesty; it *prohibited* the manufacture of oleomargarine. To that extent the legislature might be credited with believing, however ignorantly, that oleomargarine was an unwholesome product. The Ohio legislature freely permits the manufacture of oleomargarine. The supreme court of Ohio, in the case before us, declares that there is "no inhibition under the laws of Ohio of the manufacture and sale of oleomargarine."

State *ex rel.* Att'y Gen'l *vs.* C. C. D. Co., 62 O. S., 350, 367.

Neither can it be urged that from the difficulty of making suitable analysis, etc., and in thereby detecting the deleterious properties of coloring matter which might be used, the legislature was impelled, as a health measure, to prohibit the use of any coloring matter in oleomargarine.

It would be much easier for the State to inspect and find out what coloring matter went into oleomargarine (there being but two factories in Ohio) than to attempt to inspect and find out what coloring matter thousands of farmers are buying from hundreds of drug stores every day in the year for the purpose of coloring their butter. Indeed, there is no penalty for using harmful coloring matter in butter, unless under some general statute prohibiting poisonous food. The quantity of coloring matter used is so minute that practically it could not be harmful. An ounce will color a carload.

It is therefore clear from a mere reading of the statutes themselves that the prohibition against coloring matter was not prompted by any considerations for the public health.

From 1878 to 1890 there is no indication that coloring matter was considered noxious or unwholesome by the legislature of Ohio. It is forbidden, and indirectly, for the

first time in the act of 1890, and only then provided the coloration causes the oleomargarine to look like butter.

In the statute of 1894 it is forbidden to manufacture and sell oleomargarine containing *annatto*—a harmless, vegetable coloring matter; it is evident that this prohibition was not based upon considerations of public health.

Professor Weber, of the Ohio State University, whose experiments proving the fallibility of the microscopic test to differentiate butter from oleomargarine have made him equally well known in the scientific world on either side of the Atlantic, testifying for the defendant in error in the supreme court of Ohio, said:

"Q. What is annatto? A. Annatto is a vegetable coloring matter.

"Q. It is entirely harmless, isn't it? A. Yes, sir."

And see Professor Wiley's valuable and exhaustive bulletin on oleomargarine and dairy products, published by the Department of Agriculture and recognized as a standard authority the world over.

This court, speaking through Mr. Justice Harlan, in Powell *vs.* Pennsylvania, 127 U. S., 678, after conceding that the oleomargarine in the particular case before it might have been entirely wholesome, proceeds to point out that at that time (1885), on account of the secrecy of its manufacture or otherwise, the legislature might, in good faith, have believed that oleomargarine could be manufactured and sold, which would be deleterious, and that, therefore, it prohibited its manufacture or sale within the State of Pennsylvania as a measure to promote the public health.

At that time the act of Congress had not been passed regulating the manufacture of oleomargarine, and imposing a heavy tax upon it. Many small factories were scattered about the country, and but little attempt was made to inspect their methods of manufacture. Indeed, many people knew little about the constituents of oleomargarine, and may

have believed that it was made of horse, hog, or dog, as it would seem, in 1881, they still believed in Ohio.

But the Ohio statutes before us were passed long after the act of Congress became effective, when there were, perhaps, but nine or ten factories in the country, one at the city of Columbus and another at the city of Cleveland. Whatever other reasons moved the legislature to pass the laws in question, it is evident that among them was no consideration of public health.

Indeed, there has never been a time in the State of Ohio when the manufacture and sale of oleomargarine was forbidden or the inspection of its factories provided for or any constituents excluded from its composition, unless it were during a few months in 1885, when, apparently, oleomargarine was required to be compounded solely from beef suet and milk.

It is needless to say that the mere recitation in the title of an act that it is a measure to promote the public health will not be regarded by this court where it is apparent that such is not the real and sincere purpose of its enactment.

"The courts are not bound by mere form nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look to the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute, purporting to have been enacted to protect the public health or public morals or the public safety, has no real or substantial relations to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the constitution."

Mugler *vs.* Kansas, 123 U. S., 623, 661.

"In Austin *vs.* Murray (16 Pick., 121, 126) it is said:

'The law will not allow the rights of property to be invaded under the guise of a police regulation for the promotion of health, when it is manifest that such is not the object and purpose of the regulation.'

"In Watertown *vs.* Mayo (109 Mass., 315, 319) Colt, J., says:

'The law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of health or protection against a threatened nuisance; and when it appears that such is not the real object and purpose of the regulation, courts will interfere to protect the rights of the citizen.'

"In the Slaughter-house Cases (16 Wall., 36, 87), Field, J., says:

'All sorts of restrictions and burdens are imposed under the police power, and when these are not in conflict with any constitutional prohibitions or fundamental principles they cannot be successfully assailed in a judicial tribunal. But under the pretense of prescribing a police regulation, the State cannot be permitted to encroach upon any of the just rights of the citizen which the constitution intended to secure against abridgement.'

"In Coe *vs.* Schultz (47 Barb., 64) a learned judge, speaking of the constitutional limitations upon the police power, says:

'I am not willing to concede that the legislature can constitutionally declare an act or thing to be a common nuisance, which palpably, according to our present experience or information, is not and cannot be under any circumstances a common nuisance, by the common-law definitions or common-law decisions. I am not willing to conclude that the legislature can constitutionally declare or authorize any sanitary commission or board to declare the keeping or the use, in any way, of sugar or vinegar to be a common nuisance, because the one is sweet and the other sour, or for any other reason. By such an unlimited power, it is easy to see that any citizen might be deprived of his property without compensation, and without any colorable pretext that the public good required such deprivation.' (See also In the Matter of Cheesebrough, 78 N. Y., 232.)

"These citations are sufficient to show that the police power is not without limitations, and that in its exercise the legislature must respect the great fundamental rights guaranteed by the Constitution. If this were otherwise, the power of the legislature would be practically without limitation. In the assumed exercise of the police power in the interest of the health, the welfare or the safety of the public, every right

of the citizen might be invaded and every constitutional barrier swept away.

"Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. Under the mere guise of police regulations personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive.

"If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the legislature may in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law."

In re Jacobs, 98 N. Y., 98, 109.

This brings us to the discussion of the vital question in this case: Has the State of Ohio, through its legislature, the power to discriminate between butter and oleomargarine, by forbidding the one to be colored and permitting the other to contain a harmless coloring matter?

In dissenting from the opinion of this court in Powell *vs.* Pennsylvania, 127 U. S., 678, 698, Mr. Justice Field made the significant inquiry to which there can be but one answer:

"What greater invasion of the rights of the citizen can be conceived than to prohibit him from producing an article of food, conceded to be healthy and nutritious, but of designated substances in themselves free from any deleterious ingredients?"

And Mr. Justice Matthews, in delivering the opinion of this court in Yick Wo *vs.* Hopkins, 118 U. S., 356, —, as

though having in view, as he did, the possibility that such invasion might depend upon the whim or caprice of some man or set of men, forcibly said:

"The very idea that one may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

And again, in the same opinion, it is said:

"*Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.*

"This principle and interpretation has been sanctioned by this court in Henderson *vs.* Mayor of New York, 92 U. S., 259; Chy Lung *vs.* Freeman, 92 U. S., 275; *Ex parte* Virginia, 100 U. S., 329."

Without burdening this brief with citations, it is sufficient to say that large discretion is permitted to the States in the matter of legislating for their people, but especially where the public health is involved, and they have the right, even at the risk of some personal inconvenience or loss of individual liberty, to guard their citizens against fraud and deception. But the fundamental principles underlying all free government are not affected by this concession to legislative power.

The fourteenth amendment, as stated by Mr. Justice Matthews, in Yick Wo *vs.* Hopkins, 118 U. S., 356, 367, quoting from the opinion of this court in Barbier *vs.* Connelly, 113 U. S., 27—

"undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all, under like circumstances, in the en-

joyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to others under like circumstances; that no greater burdens should be loaded upon one than are loaded upon others in the same calling and condition, and that in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses, and *class legislation discriminating against some and favoring others is prohibited.*"

It would, therefore, seem too plain for controversy that a law would be invalid which forbids all grocery-keepers who are left-handed from advertising their wares and decorating their stores so as to attract customers.

No reason could be given why right-handed merchants should be preferred over those who are left-handed, or why the Government should deprive left-handed grocers of their fundamental rights. A law would seem clearly repugnant to the Constitution which forbade the maker of candy or ice-cream to use some harmless coloring matter, and by analogy would seem to be clearly objectionable which forbade the farmer to use some harmless coloring matter which made his butter more attractive.

If such a law could be justified at all, it could only find justification upon the theory that such coloration would be used by the owner of poor cows and the maker of poor butter for a fraudulent purpose, to wit, for the purpose of causing his product to appear to be and resemble Jersey butter, and thereby enable him to get a higher price through success in practicing a fraud upon the people.

This thought underlies the decision in People *vs.* Arensberg, 105 N. Y., 123, in which a conviction was sustained against a seller of oleomargarine, where the jury found that

he had colored the product so as to make it resemble "summer dairy butter," and it was said, referring to the statute upon which the prosecution was based, "that such prohibition is within the power of the legislature, and rests upon the same principles which would sustain a prohibition of coloring winter dairy butter for the purpose of enhancing its market price by making it resemble summer dairy butter, should the legislature deem such a prohibition necessary or expedient." It was found in that case that the coloring matter was added to the product with intent to deceive.

It was not claimed that it was colored to resemble butter generally (which would be absurd), but that it was purposely colored to imitate in appearance a certain grade of high-class butter.

The supreme court of Ohio, in the decision of the case at bar, announced as a finding of fact that oleomargarine "in its natural state is nearly white in color, while butter in its natural state is generally (although not always) yellow."

See printed Record, p. 22; 62 O. S.

As a matter of fact, butter is sometimes white, sometimes a golden yellow, and often every imaginable shade between a pure white and deep yellow; oleomargarine is nearly white—white shading toward yellow, a light yellow. It varies from a snow white to a straw color without any added coloring matter. Necessarily 90 per cent. of pure butter is indistinguishable in color from 90 per cent. of uncolored oleomargarine.

Professor Weber, the very eminent chemist, from whose testimony in favor of the State in this case we have already quoted, in testifying before the supreme court of Ohio, among other things, said:

"Q. You spoke, Professor, about the 'natural' color of oleomargarine, whatever you mean by that, being nearly a white; to what other color does it shade from white? A. To yellow white; a yellowish color.

"Q. What is the natural color of butter? A. Well, the natural color of butter is white and yellow.

"Q. Do you mean that some butter is white and some yellow? A. Yes, sir.

"Q. Or that all butter sometimes is white and sometimes yellow? A. Any butter is sometimes white and sometimes yellow. It depends upon the season of the year and the feed that the cattle are getting."

In Plumley *vs.* Massachusetts, 155 Mass., 223, it was decided that where a citizen of Massachusetts had been convicted under a statute which prohibited the sale of oleomargarine, "in imitation of yellow butter," that the Federal courts would not interfere with the judgment of conviction upon the ground that said law interfered with interstate commerce. It is also held that the fact that said citizen complied with the revenue law concerning oleomargarine vested in him no right abrogating the ordinary and recognized police power of the State.

It will be noticed that in the *Arensberg* and *Plumley* cases, *supra*, the reviewing courts had only to deal with a conviction of fraud against the petitioners. In both cases it had been judicially determined that the product complained of had been colored in imitation of summer dairy butter, or yellow butter.

It was assumed that certain varieties of butter had naturally a yellow color, which indicated superiority, and that oleomargarine, which was naturally white, or nearly so, in either case had been colored for the purpose of imposing it upon customers as yellow butter. It was assumed in either case that the legislature had no intention of discriminating against oleomargarine and in favor of butter; but that, finding some grades of dairy butter to be naturally yellow, it prohibited the coloration of another kind of butter, to wit, oleomargarine, so as to resemble closely and perhaps be taken for the higher priced grades.

In Ohio, however, we find by a review of the statutes this

anomalous state of affairs to exist. The maker of butter is permitted and encouraged to use coloring matter in the manufacture of his product for the market. This permission cannot be based upon the theory that the makers of cheap butter will thereby have a chance to defraud the public by causing their products to resemble "summer dairy" or "Jersey" butter, for that would be absurd; we are therefore forced to conclude that the legislature has recognized the use of coloring matter in the manufacture of butter to be entirely legitimate as making the product more palatable. It must have assumed either that the consumer would have some other way than the difference in color by which to distinguish the finest grade of butter, worth, perhaps, 50 cents a pound, from the cheapest grade, worth, perhaps, 12 cents a pound; or, on the other hand, it must have concluded that to prohibit the use of coloring matter in the manufacture of butter would be an invasion of individual liberty not warranted by any danger of possible fraud upon the consumer.

In either event, the public policy of Ohio is well established and defined. It goes to this effect: that harmless coloring matter is just as essential a constituent of butter as salt. Although much butter may be naturally white and some finer grades naturally yellow, the makers of either have an unlimited right to use in its manufacture any harmless coloring matter.

Upon what ground, then, can a law be sustained, as a valid exercise of the police power in Ohio, which prohibits the maker of oleomargarine from using, in the manufacture of his product, a harmless coloring matter? It is begging the question to say that if oleomargarine possesses the virtues claimed, it should stand or fall upon its merits and not seek the aid of coloring matter; for why should not the same argument apply to butter? Such a law, as we have seen, cannot be justified upon any ground of danger to the public health, in view of the universal license on this subject extended to

butter. Neither can any honest person pretend that the law is to be justified upon the ground that the maker of oleomargarine, if allowed to use coloring matter, may be tempted to palm it off upon the consumer for and as some high-grade Jersey butter.

Assuming all the butter manufactured in Ohio, including artificial butter, to be represented by the figure 100, it is safe to say that 95 per cent. would be what is called "natural" butter. Of this natural butter perhaps 10 per cent. would be the higher grade of butter, which at any season of the year has some yellow color. If all artificial coloring matter were rigidly excluded from all butter and oleomargarine made in Ohio it is safe to say that the high-grade butter would sell for about twice the price obtainable by oleomargarine, and that oleomargarine would sell for a little higher price than the ordinary run of uncolored country butter. The temptation to color for purposes of deception and gain will appeal with more persuasive force to the farmer than to the manufacturer.

As a matter of fact, uncolored butter has practically disappeared from the markets of Ohio, and it may in fairness be admitted that those markets are not precisely glutted with any supply of uncolored oleomargarine. Indeed, it is a fair proposition to say that few children of school age in Ohio have ever seen the substance spread upon bread of any other than a yellow color.

The sole purpose of this "color" legislation in Ohio is to make oleomargarine to appear strange, weird, and repulsive. It seeks to accomplish by indirection what the infamous "pink laws" attempted in other States.

To satisfy this court of our position, it may not be inappropriate to quote from the following bulletin issued to the dairymen of Ohio by Hon. Joseph E. Blackburn, dairy and food commissioner of Ohio, upon the decision of this very case by our State supreme court. This bulletin has become a matter of public record, and is found, among other places,

in the printed report of the hearing before the committee of the United States Senate to which was referred for consideration the so-called Grout bill, which was pending before the Senate at the second session of the 56th Congress, pp. 353, 354.

It must be borne in mind that the execution of these color laws against oleomargarine is committed solely to the dairy and food commissioner. He is authorized by law to employ inspectors, chemists, lawyers, and agents for the purpose of detecting and punishing offenses against the pure-food laws of Ohio. The prosecuting attorneys of the various counties are not troubled with these cases. The grand juries are not called upon to consider them. By special enactment, any justice of the peace may assume jurisdiction, impanel a jury of twelve men, and render final judgment. A large sum of money is placed at the disposal of the dairy and food commissioner, which he expends at his discretion in filing and prosecuting cases against those who violate the statutes of Ohio regarding the adulteration of food and dairy products.

In the testimony of Mr. Blackburn before the same committee, he stated, on page 161, that he had been dairy and food commissioner of the State of Ohio for about four years, and added:

"In that time I have spent nearly $200,000 of the State money, and of that amount I presume sixty per cent. has been spent in oleomargarine prosecutions."

It is therefore fair to consider this dairy and food commissioner who is enjoying his third successive term as qualified to speak for the State in interpreting the spirit of these laws, which he helped to pass, and with whose execution and administration he is solely charged. Let us see if we cannot detect "the evil eye and unequal hand" in Ohio.

He announces the decision of the supreme court of Ohio, and naively adds:

"As the course I have pursued in this matter sets the pace for the food commissioners of other States of our Union, whose oleomargarine laws are practically copies of ours, *this victory means that the death-knell of oleomargarine has been sounded, not only in Ohio, but in the entire United States.*

"The many assurances of good will and expressions of gratitude I have already received from the farmers and dairymen of Ohio are all the more appreciated because of their antagonism in the past, an antagonism that was engendered by a few persons who placed a greater value upon their own opinions as to the most effective method *of making war against oleomargarine* than upon the advice of able lawyers, whose counsel I saw fit to follow."

He then goes on to urge that he ought to be retained in office "because of the possibility that some of the points in the above-mentioned case may be taken to the Supreme Court of the United States;" and, in order to assure them that if re-elected he will keep this court up to the mark, he naively adds: "We should stand together in a fight to a finish against oleomargarine."

It is important to bear in mind that if both butter and oleomargarine were free from artificial coloring matter neither one could be distinguished from the other. To quote again from Professor Weber and his testimony in the court below:

"Q. No man can tell by the sense of sight alone whether or not a certain sample is butter or oleomargarine? A. No, sir; I don't think he can.

"Q. Then in order to learn whether or not a given sample is butter or oleomargarine you must resort to some chemical test, must you not? A. Yes, sir."

A statute would, therefore, be absurd which forbids the coloration of oleomargarine in imitation of butter. The Ohio statutes undertake to prohibit the coloration of oleomargarine upon the theory that it will, if colored, *resemble artificially colored butter*. Underlying it all is the assump-

tion that butter has some right of occupancy and that oleomargarine is trying to displace it, and that through some superiority which lurks in butter, but has never yet been discovered or enunciated, oleomargarine should be discouraged or entirely exterminated. The fact is that the two products are rivals in the commercial world.

Oleomargarine is equally as good and wholesome a food as butter, and contains no ingredient not found in butter any more than butter contains any ingredient not found in oleomargarine. Their sources are different, and oleomargarine is more cleanly, and, because of the temperature to which it is subjected, much more wholesome than butter, which is believed to be responsible to a large extent for the prevalence of consumption among our people.

It is true that oleomargarine is used in much the same way as butter, and that a household might dispense with either if it had the other. In the same way electricity may do the work of illuminating gas, as gas in turn has divided the burden that formerly rested upon oil; as the lamp superseded the candle; as the candle succeeded the fagot—neither is an "imitation" of the other, and the electric bulb gives a light no more "artificial" than the ruddy glow of the hunter's camp-fire.

Both represent the energy of nature subservient to human skill.

In this connection we revert to the history of dairy legislation in Ohio. We find that butter is first defined as a compound of milk and cream, or both, and salt; that coloring butter does not seem to be considered as essential to the manufacture of butter, and that nothing more is required of the oleomargarine dealer than that he should sell his product, colored or uncolored, by its true name and for what it really is. Oleomargarine during all these years was being colored yellow. Commercial oleomargarine had always been yellow. The act of Congress recognized and permitted the use of harmless coloring matter. This demand for color-

ing matter stimulated butter coloring and similar dyes, and the farmers commenced to buy them. They commenced to color their butter, and the legislature of Ohio hastened to approve of harmless coloring matter as a necessary and essential ingredient of butter. Both products ran along, side by side, artificially colored, until 1894, when the legislature peremptorily forbade the use of any coloring matter in oleomargarine. After specifying all the butter colors used by farmers and dairymen, it forbade, by a sweeping clause, "any other coloring matter."

The apparent purpose of this law was not to protect the public health and not to prevent deception, but to crush out oleomargarine, which had become a dangerous rival to butter.

The administration of this law has been solely in charge of an official who announces that "*We should stand together in a fight to a finish against oleomargarine.*"

It was sought by the supreme court of Ohio to derive some additional support for its rulings in this case by citing State *vs.* Ruedy, 57 O. S., p. 224. That case held that the statute conferring final jurisdiction upon a justice of the peace of violations of the laws forbidding adulterations in food enabled him to assume final jurisdiction in a case where the affidavit was drawn under the act of 1894, prohibiting any one to manufacture or sell oleomargarine containing any coloring matter. This ruling was placed on the ground that to *color* necessarily meant to *adulterate*, and section 3 of the act of May 16, 1884 (81 O. L., 67), was cited in support of this contention. By section 3 of that act (Bates' Ann. Stat., sec. 4200–6) it is provided that "an article shall be deemed to be adulterated if it is colored, coated, polished, or powdered, whereby damage or inferiority is concealed, or if by any means it is made to appear better or of greater value than it really is."

We submit that this section will not bear this construction when applied to the use of coloring matter in oleomargarine.

There is absolutely no ground upon which to rest the ar-

gument that oleomargarine is colored to make it appear to be something better than it really is, unless it be determined, as a matter of law, that the addition of coloring matter to oleomargarine can only be for the purpose of causing it to resemble Jersey butter. But the legislature expressly permits the use of coloring matter in the manufacture of butter, however poor the milk from which it may be churned. We are therefore bound to assume a legislative determination that a yellow color is imparted to butter in order to conform to popular prejudice and make it palatable, and that such coloration does not imply an evil mind in the maker, nor is the danger of fraud arising therefrom sufficiently obvious to justify any restraint or limitation upon the right to use it.

The use of coloring matter for butter is as general, harmless, recognized, and necessary as the use of dyes in clothing. A pure white butter is not palatable and will not be used by the people. A successful police regulation, based on the fear that oleomargarine may be sold for butter, might be framed on the lines suggested by Mr. Henry C. Pirrung, general manager of plaintiff in error, in his testimony before the United States Senate Committee, *supra*, p. 191, where he suggested that Congress or the legislature might specify that oleomargarine be colored a light straw yellow and butter be colored a deep rich golden yellow, or *vice versa*, so as to thoroughly inform the consumer of what he is purchasing. Our statutes in Ohio do not breathe the equitable spirit of this proposed enactment. So many safeguards already protect the consumer that no basis in reason can be found for the claim that the color laws are necessary for additional protection.

These safeguards outside of the "color" law are many and effective. The wholesale dealer is under direct governmental supervision. His factory is placarded with enormous signs, prescribed by the General Government, announcing what business is carried on therein, and is visited frequently and without notice by inspectors from

the Federal Government. His books are open to their searching examination. His customers are compelled each to have a license, and his reports to the Commissioner of Internal Revenue must show how many pounds are manufactured and sold each month, and to whom (for a tax of two cents a pound is levied and collected thereon). Upon every package sent out by the manufacturer is a stamp, a caution notice, and in bold-faced letters the word "oleomargarine," together with the name of the factory, its number, location, and internal-revenue district. The retail dealer must keep the product in and sell it out of a stamped receptacle. He must have displayed in his place of business a gigantic sign with the words "Oleomargarine sold here." He must stamp upon every package or parcel sold and delivered to the consumer a legible printed statement of his name and address, and that it contains oleomargarine, together with a true and accurate statement of the ingredients of which said oleomargarine is compounded, and the percentage of each.

Whatever the conditions prevailing in other States may be, I think counsel will admit that the sale of oleomargarine for and as butter is virtually unknown in the State of Ohio.

Another consideration: laws that might be eminently proper directed against a newly discovered product, or one whose properties were but little known, might soon become grossly oppressive after the occasion or excuse for their passage had passed away.

When electric cars are first introduced in a city an ordinance might be entirely proper requiring such high degree of care and caution in running through the streets as would be ridiculous after people living in the city and their horses had become familiar with them. When natural gas is first discovered or used in any part of the country explosions are numerous and many casualties occur, and laws might properly be passed supervising very closely its use among the people; but such laws, if not repealed, will become in

time invalid, for, their necessity having passed away, they simply oppress.

So with oleomargarine; when first manufactured little was known about it. Many people honestly believed it to be injurious or at least uncleanly and repulsive. No supervision was exercised over its manufacture or sale by the Federal Government, and many States felt justified either in prohibiting its manufacture or in so legislating as to proscribe it. But these conditions do not now exist. The people at large are fully informed as to how oleomargarine is made and of what it is composed. It is under rigorous governmental control. It is admitted to be as wholesome a food as butter. It is conceded to contain no constituent not found in butter, nor is there absent from oleomargarine any constituent which is found in butter. It has become a commercial rival to butter, and the laws against it are not being passed at the request of the consumer of either butter or oleomargarine, but at the request of those financially interested in driving oleomargarine out of the market.

The statutes of which we complain are well described in People *vs.* Gillisson, 109 N. Y., 389, 393, where the New York court of appeals in declaring unconstitutional the statute making it a misdemeanor for a person who sold food to give away therewith, as a part of the transaction of sale, any other thing as a premium or gift, said:

"The statute referred to is one of that kind which has been so frequent of late—a kind which is meant to protect some class in the community against the fair, free and full competition of some other class; the members of the former class thinking it impossible to hold their own against such competition, and therefore flying to the legislature to secure some enactment which shall operate favorably to them or unfavorably to their competitors in the commercial, agricultural, manufacturing or producing fields."

III.

The third charge in the petition is to the effect that the plaintiff in error manufactured and sold oleomargarine, but that the packages, rolls, and parcels thereof were not distinctly and durably stamped or printed or stenciled or marked with the full name thereof in the ordinary bold-faced capital letters required by the act of May 17, 1886, entitled "An act to prevent the adulteration of and deception in the sale of dairy products, etc." (83 O. L., 178). This charge is what we term in the code practice a negative pregnant. It does not deny that the oleomargarine and the packages thereof were labeled, stamped, stenciled, etc., in accordance with some other and later statute; and, indeed, the answer shows that the plaintiff in error did comply with the similar provisions of the act of 1894, and by universal construction that act is the one under which the dairy and food department and the manufacturers and dealers in oleomargarine are working today.

As a matter of fact, evidence was not offered touching this charge in the petition.

IV.

The fourth charge in the petition in *quo warranto* makes two charges.

1st. It is charged that the plaintiff in error refused to permit a duly qualified and acting inspector and agent of the dairy and food department to enter its factory, and has refused to permit him to examine the product manufactured by it.

2d. That it refused upon demand and tender of its value to sell and deliver to such inspector a reasonable quantity of its produce for analysis.

Our uncontradicted answer to this charge distinctly avers that "The entire fourth charge in plaintiff's petition is based upon a personal difficulty which happened on one isolated occasion between one of its officers and one of the agents of the dairy and food commissioner, who was not an assistant commissioner."

Assuming this averment to be true, it would not furnish ground for a proceeding in *quo warranto*. While some abuses of corporate power long continued and to the point of jeopardizing the public welfare may furnish ground for the State's interference by *quo warranto*, it is equally true that an occasional abuse of a mere corporate power will furnish no occasion for it.

It must further be remembered that the inquisitorial power of the State, by which its officers are allowed to enter factories and stores where food products are made and sold, do not permit a mere "inspector" or "agent" of the dairy and food department to so molest either the manufacturer or dealer in food products in Ohio.

Under favor of sections 409–7–10, Bates' Annotated Statutes of Ohio, there is created the office of dairy and food commissioner, with two assistant commissioners:

"The said commissioner, or any assistant commissioner, shall have power in the performance of their duty, to enter into any creamery, factory, store, sales-room, drug store, or laboratory, or place where they have reason to believe food or drink are made, prepared, sold or offered for sale and to examine their books, and open any cask, tub, jar, bottle, or package containing or supposed to contain any article of food or drink" (Bates' An. Stat., 409–9).

By section 409–10 the commissioner appoints two assistant commissioners, who are officers of the State, with a salary fixed by law, and to whom are confided, in conjunction with the dairy and food commissioner, the inquisitorial powers above enumerated.

"The said commissioner shall have power to employ such experts, chemists, agents, inspectors and counsel as may by him be deemed necessary for the proper enforcement of the law, their compensation to be fixed by the commissioner."

The inspectors are not officers of the State. They lack all indicia of office; they have no fixed term; they have no fixed salary; they have no prescribed duties, but are simply employés. This was decided by the supreme court of Ohio in State *ex rel.* Reynolds *vs.* The Capital City Dairy Company, 62 O. S.

Indeed, the personal difficulty referred to in the answer of plaintiff in error, in the court below, alone supported both the Reynolds case and the fourth charge against the plaintiff in error in the *quo warranto* proceedings.

Grave doubts must exist as to the validity of section 4 of the act of May 16, 1884 (81 O. L., 67). Without disputing the right of the State to inspect foods offered for sale upon the market, there are grounds to think that this particular statute goes beyond the limitations of that power. It requires a dealer to deliver a sample sufficient for analysis "to any one interested or demanding the same." No provision is made as to how it shall be determined how much of a sample is sufficient for analysis or what the value of the same shall be in case a dealer and his customer are not in accord upon that point.

Again, the person "demanding the same" need not be a chemist nor an officer of the State. Neither is it required that he shall in good faith demand the sample or require it to be delivered to him.

But in the case at bar a more troublesome question arises. The State law only requires the maker or vendor of food to sell upon demand "a sample sufficient for analysis." Such a sample of oleomargarine would be in weight about one-half ounce, although for convenience the inspectors, in their journeys about the State, usually purchase a sample weighing one pound. They probably could not require the dealer

to sell as much, for it is far in excess of the quantity needed. The test for differentiating oleomargarine from butter is known as Reichard's method, or Reichard's number.

This test requires the use of two and one-half grams of the saponified fats. The test for "color" requires the use of a very minute quantity of the fat, perhaps one-eighth of a teaspoonful. Certainly elaborate experiments could be made with two ounces of oleomargarine. Nobody will pretend that a chemist could possibly consume half a pound. Now, then, can the inspector under favor of section 4 of the act of March 16, 1884 (81 O. L., 67), demand, as and for analysis, more than half a pound of oleomargarine from any maker thereof? But, under the Federal law, the plaintiff in error cannot sell less than 10 pounds. It is obliged to sell, against its will, ten pounds of its product by the terms of a law which only permits the buyer to exact one-twentieth or one-fortieth of that amount.

It is evident that the third and fourth charges in the petition were put in to make weight, and that the real question mooted in the supreme court of Ohio, and which both sides eagerly desire to be definitely and finally settled by this court, is whether the Ohio statute forbidding the use of harmless coloring matter in the manufacture of nutritious food is valid legislation.

We claim that the maker of oleomargarine has the same right to color his product yellow that the maker of a hat has to color his product black. These laws do not protect the people; they are hated by the consumer, and every day they become of less value to the farmer. Within twenty-five years the churn used by the farmer's wife will be as extinct as the dodo. Farmers carry their milk to creameries, where they sell it and make more money than they can by churning it into butter.

Indeed, throughout Ohio today a large proportion of the farming population sell their milk, and even their butter, and for their own use buy and eat oleomargarine. It is the

owners of creameries who keep up this agitation; who support an arrogant lobby to camp in the Capitol at Washington whenever Congress is in session; who urge the passage of the Grout bill, and who insist upon upholding the sumptuary laws against oleomargarine.

We insist that these laws plainly violate the principles of liberty; that they are pure class legislation; that they are as baldly vicious and as shame-faced in the presence of the Constitution as would be laws passed under the dictation of a natural-gas lobby forbidding the manufacture and sale of artificial gas containing any color or other ingredient causing it to look like natural gas.

It cannot be too well remembered, the celebrated definition by Mr. Justice Swayne in the Slaughter-house Cases, 16 Wall., 127:

"Liberty is the freedom from all restraints but such as are *justly imposed* by law; beyond that line lies the domain of usurpation and tyranny."

Respectfully submitted.

THOMAS EWING STEELE,
Attorney for Plaintiff in Error.

APPENDIX A.

STATE OF OHIO *ex Rel.* ATTORNEY GENERAL
vs.
THE CAPITAL CITY DAIRY COMPANY.

Pure-food laws—Manufacture of oleomargarine—Police power of the State—Dairy products—Validity of acts of March 7, 1890; May 16, 1894; May 17, 1886, etc.—Punishment by criminal law does not bar quo warranto proceedings when violation of law by corporation—Constitutional law.

1. The police power of the State is properly exercised in the prevention of deception in the sale of dairy products and in the protection of the health of the people, and it is within the scope of this power to regulate the manufacture and sale of articles of food, even though the right to manufacture and sell such articles is a natural right guaranteed by the constitution.
2. The acts of March 7, 1890 (87 O. L., 51), and of May 16, 1894 (91 O. L., 274), and of May 17, 1886 (83 O. L., 178), as amended March 21, 1887 (84 O. L., 182), and of March 20, 1884 (81 O. L., 67), (the purpose of which acts is to prevent deception in the sale of dairy products and to preserve the public health) are a reasonable exercise of the police power, and do not contravene any section of the constitution.
3. The mere fact that the criminal laws of the State provide for the punishment, by fine, of those who offend against the above-recited sections, is not a bar to a proceeding in *quo warranto* to oust a corporation engaged in the manufacture of oleomargarine from the exercise of its right to be a corporation.
4. Where the manner of conducting a business, which the State's charter gives power to a company to conduct as a corporation, is in disregard and defiance of the laws of the State relating to that business, an abuse

of the power results, and *quo warranto* may properly be invoked to stop the abuse, and, if the abuse be *flagrant*, to oust the corporation.

(Decided April 10, 1900.)

F. S. Monnett, attorney general, and E. B. Dillon, for plaintiff.

Thomas E. Steele, for defendant.

SPEAR, *J.*:

The defendant is an Ohio corporation, chartered June 27, 1893, and thereby granted the right, privilege, and franchise of manufacturing, selling, and dealing in oleomargarine and the materials and utensils employed in the manufacture, storage, and transportation thereof, and all things incident thereto. Its principal place of business is the city of Columbus. The complaint is that the defendant has continuously since about the time of its creation offended against the laws of the State, misused its corporate authority, franchises, and privileges, and assumed franchises and privileges not granted to it, and has assumed and exercised rights, privileges, and franchises specially inhibited by law in these particulars, to wit: 1. It has manufactured and sold an article in imitation and semblance of natural butter, which article was made of animal and vegetable oils and compounds with milk or cream, or both, which was not in separate and distinct form and in such manner as would advise consumers of its real character, and was not free from coloring matter, or other ingredients causing it to look like and appear to be butter, which said article was not butter, but was an article made in imitation and semblance thereof. 2. It has manufactured and has offered and exposed for sale, and has sold and delivered, and held in its possession with intent to sell and deliver, in quantities from ten thousand to twenty thousand pounds daily, oleomargarine, containing coloring matter, namely, annotto, and other coloring matter to relator unknown. 3. It has manufactured and sold a substance purporting and appearing to be butter, and having the semblance of butter, but which was not butter, but was oleomargarine, and the parcels and rolls thereof were not distinctly and durably stamped, or painted, or marked in the true name thereof in ordinary bold-face capital

letters. 4. It has refused, and still refuses, to deliver and furnish to the duly appointed, qualified, and acting inspector and agent of *the dairy any food* commissioner of the State any sample or quantity of oleomargarine manufactured by it, although duly demanded by him, and the value of the same for a ten-pound package thereof or any other reasonable quantity thereof was tendered it for the analysis thereof, and has refused and still refuses to permit said inspector and agent to enter its factory for any purpose whatsoever, and has refused and still refuses to permit him to examine or cause to be examined any of the products manufactured by it. And further, that all of said violations of law have been made and done by the defendant with full knowledge of the said violations and for the expressed purpose and intent of violating and evading said laws, for the purpose of deceiving the people of this and other States as to the real character of its said product, contrary to the act of March 7, 1890, entitled "An act to prevent deception in the sale of dairy products and preserve the public health."

Evidence in support of these charges was introduced on the part of the State. No evidence was offered by defendant. Without going into detail, it is sufficient to say that the evidence compels the conclusion that the acts charged have been committed by defendant, and that their frequency and the conduct of the officers of the department in relation thereto warrant the further conclusion that the acts were committed wilfully and with the intent to disregard the provisions of statute, and to defy the officers of the State whose specific duty it is to enforce the law in this behalf. So that the natural results of all such acts are presumed to have been intended. Objection is offered to the competency of testimony as to acts of the defendant since the commencement of this proceeding. But, inasmuch as the matter of final judgment depends somewhat upon the discretion of the court, we regard this evidence competent as bearing upon the animus, purpose, knowledge, and intent of the defendant, and as calculated to aid the court in the exercise of a proper discretion respecting the character of the judgment to be entered.

The defense offered is twofold: First, that the acts, a violation of which is charged, are unconstitutional as being an arbitrary and unauthorized attempt to interfere with the

natural right to conduct a legitimate business, which is beneficial to the public as well as profitable to its promoters; and, second, that this proceeding cannot be maintained, because if the laws referred to be valid, their violation is punishable in a criminal proceeding and a definite, adequate penal sentence may follow a conviction in such proceeding; and, besides, the right to manufacture and vend oleomargarine is not a franchise, and its abuse, should the same be shown, is not the abuse or misuse of a franchise and not the proper subject of a *quo warranto* proceeding. Hence relator has mistaken his remedy, and its petition should be dismissed.

The statutes claimed to have been violated are the act of March 7, 1890, entitled "An act to prevent deception in the sale of dairy products and to preserve the public health," annotated in Bates' Statutes as sections 4200–13–14, by which it is provided that—

(4200–13.) "No person by himself or his agent, or his employé, shall render or manufacture for sale out of any animal or vegetable oils, not produced from unadulterated milk or cream from the same, any article in imitation or semblance of natural butter or cheese, produced from pure unadulterated milk or cream from the same, nor compound with or add to milk, cream or butter, any acids or other deleterious substance, or animal fats, or animal or vegetable oils not produced from milk or cream, so as to produce any article or substance or any human food, in imitation or semblance of natural butter or cheese, nor shall sell, keep for sale, or offer for sale, any article, substance, or compound made, manufactured or produced in violation of the provisions of this section whether such article, substance or compound shall be made or produced in this State or elsewhere."

(4200–14.) "For the purpose of this act, the terms 'natural butter or cheese,' 'natural butter or cheese produced from pure unadulterated milk or cream from the same, butter and cheese made from unadulterated milk or cream, butter or cheese, the product of the dairy,' and butter or cheese shall be understood to mean the products usually known by the terms butter and cheese and which butter is manufactured exclusively from pure milk or cream or both, with salt and with or without any harmless coloring matter, and which cheese is manufactured exclusively from pure milk or cream or both, with salt and rennet and with or without

any harmless coloring matter or sage. It is further provided that nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form and in such manner as will advise the consumer of its real character, free from any coloring matter or other ingredient, causing it to look like or to appear to be butter, as above defined."

Also, the act of May 16, 1894, having a like title, now section 4200–16, which reads:

"No person shall manufacture, offer or expose for sale, sell or deliver, or have in his possession with intent to sell or deliver, any oleomargarine which contains any methly (methyl) orange, butter yellow, annatto, analine dye or any other coloring matter."

Also the first section of the act of May 17, 1886, as amended March 21, 1887, entitled "An act * * * to prevent adulteration and deception in the sale of dairy products," now section 4200-30, which provides:

"That no person shall sell, expose or offer for sale or exchange, any substance purporting, appearing, or represented to be butter or cheese, which substance is not made wholly from pure milk or cream, salt and harmless coloring matter, unless it is done under its true name, and each vessel, package, roll or parcel of such substance has distinctly and durably painted, stamped, stenciled, or marked thereon the true name of such substance in ordinary bold-faced capital letters not less than five-line pica in size, and also the name of each article or ingredient used or entering into the composition of such substance in ordinary bold-faced letters, not (less) than pica in size, or sell or dispose of in any manner to another, any such substance without delivering with each amount sold or disposed of, a label on which is plainly or legibly printed in ordinary bold-faced capital letters not less than five-line pica in size, the true name of such substance, and also the name of such articles used and entering into the composition of such substance in ordinary bold-faced letters, not less than pica in size, if the same be not made wholly from pure milk or cream, salt and harmless coloring matter, and the words 'butter,' 'creamery' or 'dairy,' or any word or combination of words embracing the same shall not be placed on any vessel, package, roll, or parcel containing any imitation dairy product or substance

not made wholly from pure milk or cream, salt and harmless coloring matter."

Also section 4 of the act of March 20, 1884, entitled "An act to provide against the adulteration of food and drugs," now section 4200–7, which provides that—

"Every person manufacturing, offering or exposing for sale, or delivering to a purchaser any drug or article of food included in the provisions of this act, shall furnish to any person interested or demanding the same, who shall apply to him for the purpose, and shall tender him the value of the same, a sample sufficient for the analysis of any such drug or article of food which is in his possession."

It is not intended here to enter into a general dissertation respecting the origin or method of manufacture of oleomargarine, or its usefulness or healthfulness when manufactured of pure and clean materials and in a cleanly and wholesome manner. It is sufficient to say that it is not, within the meaning of these acts, butter when made in any manner and of any ingredients; that in its natural state it is nearly white in color, while butter in its natural state is generally (although not always) yellow, but oleomargarine when colored can be made and is made to so nearly resemble butter as to be easily and, when not distinctly marked, usually mistaken for it, and that it may be and often is manufactured from such material and in such manner as to be deleterious to health. With this general statement we proceed to consider *seriatim* the objections and defenses before stated.

1. The constitutionality of the several acts. What is their purpose and scope? At the outset it should be understood that the statutes do not undertake to prohibit the manufacture or sale of oleomargarine; on the other hand, their expressed purpose, gathered from text and title as well, is to regulate its manufacture and sale. In substance they provide that no one shall manufacture for sale any article in imitation of butter or any compound or substance or any human food in imitation or semblance of natural butter which is not pure butter; that no one shall manufacture or offer or expose to sale any oleomargarine which contains any coloring matter; that no one shall sell any substance purporting, appearing, or represented to be butter or having a semblance of butter, unless it be under its true name and with proper mark designating such name, and that all per-

sons dealing in food shall, upon proper application and tender of price, furnish a sample suitable for analysis. Construed with that part of section 2 of the act of March 7, 1890, which provides that oleomargarine may be manufactured "in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from any coloring matter or other ingredient, causing it to look like, or appear to be butter," it becomes entirely manifest that this legislation is regulation, not prohibition. So that we may leave out of consideration that portion of the argument which seeks to establish on the one hand, and deny on the other, a right in the State to directly prohibit its sale or legislate so as to reach that result by indirection. The question, therefore, is, do the sections of the statute quoted, or any of them, violate our bill of rights which guarantees the right of acquiring and protecting property; or do they in any way violate the constitution as being subversive of the constitutional right to liberty and the enjoyment of property? In other words, is it within the legislative competency to establish regulation for the prevention of fraud and deceit in the sale of articles of food?

We are of opinion that the question is not an open one in Ohio. This court has held again and again that the police power of the State is properly exercised in the protection of the people in all matters concerning their health, and that it is within the scope of this power to regulate the manufacture and sale of articles of food, even though the right to so manufacture and sell is a natural right guaranteed by the constitution. Conceding that where the pursuit rests upon natural right and the product is not harmful, this power may not be exercised in a way which will result practically in inhibition, though under the guise of regulation and in fostering the interests of a rival product; yet where the manufacture is conducted in such way as is calculated to deceive, lead the buyer to suppose he is purchasing an article of food which is everywhere recognized as wholesome, and especially where the article sought to be regulated may easily be manufactured so as to be harmful, and thus result in fraud upon and injury to the public, the police power is properly exercised in the regulation of the manufacture and sale of such article by such requirements as will tend to insure the public against fraud and injury. Its proper disposition is not forbidden. As

stated in *Jordan vs. Overseers, infra*, the owner " has power to mortgage the property, or give direction to his labors at his pleasure, subject only to the paramount claims of society, which require that his enjoyment may be modified by the exigencies of the community to which he belongs and regulated by laws which render it subservient to the general welfare." These several statutes, framed to accomplish this end, entail no particular hardship, are reasonable in their requirements, and do not contravene any section of the constitution, nor is there any question whatever in regard to the power of the State to compel a sample for analysis of any article of food. It would be a waste of space to argue the matter. We hold that in that particular also the statute is reasonable and just (*Jordan vs. Overseers*, 4 Ohio, 295; *The State vs. Ruedy*, 57 Ohio St., 224). Other authorities covering the question are abundant, but it is not necessary to refer to them here. They will be found cited in the briefs of counsel. However, we call attention to a recent utterance of the Supreme Court of the United States in *Gundling vs. Chicago*, which involved the right of the city to forbid the sale of cigarettes without a license; opinion by Mr. Justice Peckham:

" Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of citizens are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference.

" It is not a valid objection to the ordinance that it partakes of both the character of a regulation and also that of an excise or privilege tax. * * * So long as the State law authorizes both regulation and taxation it is enough, and the enforcement of the ordinance violates no provision of the Federal Constitution."

2. The remedy by criminal prosecution.—It is enough to say of this objection that the remedy is not adequate. The object of the statute is to protect the public. In the nature

of things, a small fine is not a sufficient deterrent to accomplish the desired end, especially in the case of a company possessed of ample means and conducting a large business. The difference between the price at which butter may be manufactured and sold and that at which oleomargarine may be afforded is so large that the temptation to impose upon the public is too great to be resisted. In addition to this, there are practical difficulties in obtaining convictions which the experience of the dairy and food commissioner, as shown by his report, a public document, fully attests (*Rex. vs. R'y Co.*, 2 B. & Ald., 646; *People ex rel. vs. B'd of State Auditors*, 42 Mich., 422).

3. The right to manufacture and sell oleomargarine is not a franchise, and hence the proceeding of *quo warranto* not a proper remedy. It would seem a sufficient answer to this proposition to say that if it be true, then the defendant has no franchise whatever. Its charter, the certificate of the secretary of state, gives it "the right, privilege and franchise of manufacturing, selling and dealing in oleomargarine," etc., etc. This authority carries the implication that the business must be conducted in conformity to the laws of the State. It could not have been the intent of the General Assembly, in enacting laws permitting the formation of corporations, to give them power to override the State, although the conduct of the officers of the defendant would seem to imply that they have entertained a different opinion. The time has not yet arrived when the created is greater than the creator, and it still remains the duty of the courts to perform their office in the enforcement of the laws, no matter how ingenious the pretexts for their violation may be, nor the power of the violators in the commercial world.

In order to avoid misunderstanding, it may be well to here repeat what substantially appears elsewhere: that there is no inhibition under the laws of Ohio of the manufacture or sale of oleomargarine. The requisite simply is that it shall purport to be what it really is and shall not be so manufactured and put up as to deceive the consumer. Section 4200–14 (Bates) distinctly provides "that nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine, in a separate and distinct form, and in such manner as will advise the consumer of its real character." * * *

In the present case the acts of the defendant have been

persistent, defiant, and flagrant, and no other course is left to the court than to enter a judgment of ouster and to appoint trustees to wind up the business of the concern.

Judgment accordingly.

OFFICE OF SUPREME COURT REPORTER,
COLUMBUS, OHIO, *March* 25, 1901.

I do hereby certify the foregoing to be a true and correct copy of the syllabus and opinion in the case of State *ex rel.* Attorney General *vs.* The Capital City Dairy Company, as handed down by the court on April 10, 1900, and as it officially appears in 62 Ohio St., 350.

E. O. RANDALL,
Supreme Court Reporter.

No. 257

Brf. of Dillon for

Office Supreme Court U.S.
FILED
DEC 27 1900
JAMES H. McKENNEY,
Clerk.

Filed Dec. 27, 1900.

Supreme Court of the United States

OCTOBER TERM 1900

No. 257

THE CAPITAL CITY DAIRY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF OHIO, *EX REL.* ATTORNEY GENERAL, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO

Brief in Favor of Motion to Dismiss or Affirm

JOHN M. SHEETS,
Attorney General of Ohio.

R. B. DILLON,
Of Counsel.

(17,727)

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Brief in Favor of Motion to Dismiss or Affirm

THE MOTION

Now comes the defendant in error herein, by E. B. Dillon, its counsel, appearing in that behalf, and moves the court to dismiss the writ of error herein: First. Because this court is without jurisdiction to hear and determine any of the matters involved in said writ of error.

And second. Because at least one of the findings in fact on which the judgment in the Supreme Court of Ohio is predicated, shows no jurisdiction possible to this court, and

is of itself sufficient to and must sustain the judgment of the court below.

Said defendant in error further moves the court to affirm the judgment of the Supreme Court of Ohio below for the reasons following:

First. Because while the record may show that this court has jurisdiction, it is manifest the writ was taken for delay only.

Second. Because it appears by the record, that the judgment of the court below, must be sustained, even though all questions over which this court might have jurisdiction, be decided favorably to plaintiff in error.

Third. Because the questions of law involved, have already been decided in this court and have become the settled law of this court.

STATEMENT

Plaintiff in error is an Ohio corporation, created therein June 26, 1893. The said State of Ohio, through its Attorney General, filed a petition in quo warranto in the Supreme Court of Ohio, containing four charges of wilful violation of as many Ohio laws; and upon denial of the same, the court heard evidence and found said charges to be true. Thereupon the Supreme Court entered a judgment of ouster against said corporation on April 10, 1900, in accordance with the laws of the State of Ohio on that behalf. To this judgment, the said corporation filed its writ of error in this court. By the assignment of error filed herein, this corporation claims the Supreme Court erred in deciding that the

four separate statutes, the violation of which the corporation was found guilty, were valid and constitutional enactments, and contends that said enactments are in contravention of the Constitution of the United States.

The defendant in error has now filed its motion to dismiss the writ of error, or affirm the judgment of the Supreme Court of Ohio, a copy of which motion is given on the opening page of this argument, the grounds therefor being:

First. Because this court has no jurisdiction.

Second. Because at least one of the findings in fact on which the judgment in the Supreme Court of Ohio is predicated, shows no jurisdiction possible to this court, and is of itself sufficient and must sustain the judgment of the court below.

Third. Because even if the record show that this court has jurisdiction, it is manifest the writ was taken for delay only.

Fourth. Because it appears by the record, that the judgment of the court below, must be sustained, even though all questions over which this court might have jurisdiction, be decided favorably to plaintiff in error.

Fifth. Because the questions of law involved, have already been decided in this court and become the settled law thereof.

THE LAWS IN QUESTION

The corporation was chartered for the purpose of manufacturing and selling oleomargarine, with its place of business at Columbus, Ohio.

The first statute which the Supreme Court of Ohio finds that this corporation continuously violated, is one which for-

bids the manufacture or sale of any article which is in imitation or semblance of natural butter, or which is not a separate or distinct form such as would advise consumers of its real character. This act is as follows:

"(4200-13.) No person by himself or his agent, or his employe, shall render or manufacture for sale out of any animal or vegetable oils, not produced from unadulterated milk or cream from the same, any article in imitation or semblance of natural butter or cheese, produced from pure unadulterated milk or cream from the same, nor compound with or add to milk, cream or butter, any acids or other deleterious substance, or animal fats, or animal or vegetable oils not produced from milk or cream, so as to produce any article or substance or any human food in imitation or semblance of natural butter or cheese, nor shall sell, keep for sale or offer for sale, any article, substance or compound made, manufactured or produced in violation of the provisions of this section, whether such article, substance or compound shall be made or produced in this State or elsewhere."

(4200-14.) "For the purpose of this act, the terms 'natural butter and cheese,' 'natural butter or cheese produced from pure unadulterated milk or cream from the same, butter and cheese made from unadulterated milk or cream, butter or cheese, the product of the dairy,' and butter or cheese shall be understood to mean the products usually known by the terms butter and cheese, and which butter is manufactured exclusively from pure milk or cream or both, with salt and with or without any harmless coloring matter, and which cheese is manufactured exclusively from pure milk or cream or both, with salt and rennet and with or without any harmless coloring matter or sage. It is further provided that nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from any coloring matter, or other ingredient causing it to look like or to appear to be butter, as above defined."
(Act of March 7, 1890. 87 Ohio Laws, 51.)

The second statute which the Supreme Court of Ohio found the defendant guilty of continuously violating, is one

to prevent the manufacture or sale of oleomargarine which contained any artificial coloring matter. This act in full is as follows:

(4200-16.) "No person shall manufacture, offer or expose for sale, sell or deliver, or have in his possession with intent to sell or deliver, any oleomargarine which contains any methly (methyl) orange, butter yellow, annatto, analine dye, or any other coloring matter." (Act of May 16, 1894. 91 Ohio Laws, 274.)

The third act which the Supreme Court of Ohio found the defendant guilty of continuously violating, forbids the selling of any substance having the semblance of butter, unless done under its true name, and that each roll thereof be durably painted, stamped, stenciled or marked. The statute in full is as follows:

(4200-30) "That no person shall sell, expose or offer for sale or exchange, any substance purporting, appearing or represented to be butter or cheese, or having the semblance of either butter or cheese, which substance is not made wholly from pure milk or cream, salt and harmless coloring matter, unless it is done under its true name, and each vessel, package, roll or parcel of such substance has distinctly and durably painted, stamped, stenciled or marked thereon the true name of such substance in ordinary bold-faced capital letters, not less than five-line pica in size, and also the name of each article or ingredient used or entering into the composition of such substance, in ordinary bold-faced letters not (less) than pica in size, or sell or dispose of in any manner to another, any such substance without delivering with each amount sold or disposed of, a label on which is plainly or legibly printed in ordinary bold-faced capital letters not less than five-line pica in size, the true name of such substance, and also the name of such articles used and entering into the composition of such substance in ordinary bold-faced letters, not less than pica in size, if the same be not made wholly from pure milk, or cream, salt and harmless coloring matter; and the words 'butter,' 'creamery,' or 'dairy,' or any word or combination of words embracing the same shall not be

placed on any vessel, package, roll or parcel containing any imitation dairy product or substance not made wholly from pure milk or cream, salt and harmless coloring matter." (First section of the Act of March 21, 1887. 84 Ohio Laws, 182.)

The fourth act which the Supreme Court of Ohio found the defendant guilty of continuously violating, provides for the furnishing of samples for analysis on demand and upon tender of the value of the same. This act in full is as follows:

(4200-7) "Every person manufacturing, offering or exposing for sale, or delivering to a purchaser, any drug or article of food included in the provisions of this act, shall furnish to any person interested or demanding the same, who shall apply to him for the purpose, and shall tender him the value of the same, a sample sufficient for the analysis of any such drug or article of food which is in his possession." (Section 4 of the Act of March 20, 1884. 81 Ohio Laws, 67.)

EXTRACTS FROM THE RECORD

The petition in quo warranto charging the defendant with violation of the foregoing laws, is as follows: (Record, page 1.)

SUPREME COURT OF OHIO

STATE OF OHIO, ON THE RELATION OF FRANK S. MONNETT, ATTORNEY GENERAL THEREOF,

PLAINTIFF,

VS.

THE CAPITAL CITY DAIRY COMPANY, A CORPORATION,

DEFENDANT.

PETITION IN QUO WARRANTO

The relator, Frank S. Monnett, is the duly elected, qualified and acting attorney general of the State of Ohio.

The defendant, The Capital City Dairy Company, is a corporation organized and existing under the laws of the State of Ohio.

The said defendant corporation filed its articles of incorporation with the Secretary of the State of Ohio, and was created a corporation on June 27, 1893, and was chartered on said day in accordance with the laws of this State, and thereby granted the right, privilege and franchise of manufacturing, selling and dealing in oleomargarine and the materials and utensils employed in the manufacture, storage and transportation thereof and all things incident thereto. A copy of the articles of incorporation of said corporation is attached hereto and made a part hereof, marked Ex. "A."

The said Frank S. Monnett, attorney general of the State of Ohio, gives the court to understand and be informed that the said defendant, The Capital City Dairy Company, has continuously since about the time of its creation up to the present day, within this State, to wit, at and in the county of Franklin, offended against the laws of this State, misused its corporate authority, franchise and privileges, and assumed franchises and privileges not granted to it, and has assumed and exercised rights, privileges and franchises, specially inhibited by law in the following particulars and matters, to wit:

First charge. Said defendant corporation has, during the times and at the places aforesaid, manufactured and sold an article in imitation and semblance of natural butter which

said article was made out of animal and vegetable oils and compounded with milk or cream and both; which said article was not then and there in separate and distinct form and in such a manner as would advise consumers of its real character, and was not free from coloring matter or other ingredients causing it to look like and appear to be butter, and said article was not butter, but was an article made in imitation and semblance thereof.

Second charge. The defendant corporation has, at the times and places above mentioned, manufactured and has offered and exposed for sale, and has sold and delivered and had in its possession with intent to sell and deliver oleomargarine in large quantities—as your relator is informed, in quantities from ten thousand to twenty thousand pounds thereof daily; which said oleomargarine contained coloring matter, to wit, annatto and other coloring matter, unknown to relator.

Third charge. The said defendant corporation, during the times and at the places above stated, has manufactured and sold a substance purported and appearing to be butter and having the semblance of butter, but which substance was not butter, but was oleomargarine, but the packages, rolls and parcels thereof were not distinctly and durably stamped, or painted, or stenciled, or marked in the true name thereof in the ordinary bold-faced capital letters required by the act of May 17, 1886, entitled, "An Act to prevent the adulteration of and deception in the sale of dairy products, etc." 83 O. L., 178.

Fourth charge. Said defendant corporation has refused and still refuses to deliver and furnish to the duly appointed, qualified and acting inspector and agent of the dairy and food

commissioner of this State, any sample or quantity of the oleomargarine manufactured by it, although duly demanded by him and the value of the same for a ten-pound package thereof or any other reasonable quantity thereof was tendered it for the analysis thereof; contrary to Section 4 of the act of March 20, 1884, entitled, "An Act to provide against the adulteration of food and drugs," 81 O. L., 67; and said defendant has refused and still refuses to permit said inspector and agent to enter into its factory for any purpose whatsoever, and has refused and still refuses to permit him to examine or cause to be examined any of the products manufactured by it.

Fifth charge. All of said violations of the laws of this State as set forth in the first, second, third and fourth charges have been made and done by said defendant corporation with full knowledge of the said violations of law, and for the expressed purpose and intent of violating said laws and evading the same, and for the purpose of deceiving the people of this State and other States as to the real character of its said product, contrary to the act of March 7, 1890, entitled, "An Act to prevent deception in the sale of dairy products and to preserve the public health." 87 O. L., 51.

Wherefore, the plaintiff prays that the defendant may be adjudged to forfeit its franchise and be ousted therefrom, and that trustees therefor be appointed according to law, to wind up and settle the affairs of the corporation, collect and pay the outstanding debts, and divide the money and other property which may remain after the payment of the debts and necessary expenses among the stockholders, and for such other and further relief as the nature of the case may warrant.

F. S. MONNETT,
E. B. DILLON, of Counsel,
Attorneys for Plaintiff."

The object for which the said defendant was incorporated and powers assumed by it, is as follows: (Record, page 3.)

"Said corporation is formed for the purpose of manufacturing, selling and dealing in oleomargarine and the materials and utensils employed in the manufacture, storage and transportation thereof, and all things incident thereto."

THE ANSWER of defendant is as follows: (Pages 5-11.)

"And now comes the said The Capital City Dairy Company, and for a first answer to the petition herein says that it admits that the relator, Frank S. Monnett, is the duly elected, qualified and acting attorney general of the State of Ohio; that the defendant, The Capital City Dairy Company, is a corporation organized and existing under the laws of the State of Ohio; that it filed its articles of incorporation with the secretary of the State of Ohio and was created a corporation, as alleged, and was thereby granted the right, privilege and franchise of manufacturing, selling and dealing in oleomargarine and the materials and utensils employed in the manufacture, storage and transportation thereof and all things incident thereto; that a copy of the articles of incorporation of said corporation is attached to the petition herein.

And this defendant, further answering, says that it denies the statements and allegations contained in each of the five charges of the petition and denies each and every statement and allegation in the petition contained not in this pleading specifically admitted to be true.

The defendant denies that it has continuously since about the time of its creation up to the present day, or at any time

during said period, offended against the laws of this State, misused its corporate authority, franchise and privilege and assumed franchises and privileges not granted to it, and assumed and exercised rights, privileges and franchises specially inhibited by law, as charged in the first, second, third, fourth and fifth charges of said petition. It denies that it has at the times and places charged or at any other time and place manufactured and sold an article in imitation and semblance of natural butter, which said article was made out of animal and vegetable oils and compounded with milk or cream and both, which said article was not then and there in separate and distinct form and in such manner as would advise consumers of its real character, and was not free from coloring matter or other ingredients, causing it to look like and appear to be butter, said article not being butter, but being an article made in imitation and semblance thereof. This defendant corporation further represents to the court and avers that oleomargarine is an article of commerce, and its ingredients, constituents, nature and character are well known; that it is a nutritious and wholesome article of food, in almost universal use among the people; that it is, like butter, an artificial compound; that butter closely resembles it in appearance, both substances being naturally of a light-yellow color. It denies that in manufacturing its product it has sought to imitate any other product or to produce any imitation of or substitute for any other compound. It denies that it has manufactured or sold any oleomargarine containing annatto or any other coloring matter except during a short period of time, to wit, for about 60 days in mid-winter, when the color of all natural butter was white and when the color of its product, by reason of the use of such coloring

matter, was yellow. It avers that said oleomargarine so manufactured was manufactured solely for the purpose of selling and delivering the same in the unbroken and original packages to customers in other states than the State of Ohio, and that the only coloring matter used was annatto, which was and is a harmless vegetable coloring matter.

And this defendant protests that it desires to comply with and obey any and all valid laws regulating the manufacture and sale of its product, but respectfully represents to this court and avers that the statute or statutes in force in this State purporting to prohibit the use of coloring matter in the manufacture of this product are repugnant to and in contravention of the constitution of the State of Ohio and the Constitution of the United States.

This defendant corporation denies that it has at any time or place manufactured and sold oleomargarine or any substance purporting and appearing to be butter and having the semblance of butter without distinctly labeling each package, as provided by law.

This defendant corporation denies that it has refused and still refuses to deliver to the duly appointed, qualified and acting inspector and agent of the dairy and food commissioner of this State any sample or quantity of the oleomargarine manufactured by it or any reasonable quantity thereof, and denies that it has refused and still refuses to permit any officer authorized by law to enter into its factory, or has refused to permit such officer to examine or cause to be examined any of the products manufactured by it.

This defendant corporation denies that it has violated any of the laws of the State of Ohio, or that it has endeavored, whether by violating the law or otherwise, to deceive, or

that it ever has deceived, the people of this State and other states as to the real character of its product, to wit, oleomargarine.

This defendant further represents and avers that no substance was ever manufactured or sold by it except oleomargarine; that all the oleomargarine ever manufactured or sold by it was so manufactured and sold in distinct and separate form, labelled in black letters at least five-eighths of an inch square "oleomargarine," and the name and per cent. of each ingredient therein, as provided by law. Said defendant says that it has expended thousands of dollars in advertising its business as a manufacturer and jobber of oleomargarine; that it has never pretended to manufacture or sell any butter; that it has never sold any oleomargarine except as such and that all oleomargarine shipped from its factory or manufactured or sold thereat was not only labelled, stenciled and marked as required by the statutes of this State, but also labelled and marked as required by the statutes of the United States and the regulations of its Internal Revenue Department, each package containing revenue stamps and labelled "oleomargarine," and in short this defendant says that it has never manufactured or sold any oleomargarine except as such, and has never desired to sell any except as such.

It further says that the entire fourth charge in plaintiff's petition is based upon a personal difficulty which happened on one isolated occasion between one of its officers and one of the agents of the dairy and food commissioner, who was not an assistant commissioner.

This defendant further denies that it has ever violated the laws or this State or done anything, whether unlawful or not, for the purpose of deceiving the people of this country as to

the real character of its product, contrary to the act of March 7, 1890, or any other provisions of the laws of Ohio. It says, on the contrary, it has gone to great trouble and expense to advise the public of the fact that it manufactured and sold oleomargarine and nothing else.

2. And now, for a second defense, the defendant here adopts all and singular the averments and statements in the foregoing first answer contained as fully as if the same were here again specially stated, and says that it did on several occasions since January 1, 1898, and prior to March 1, 1898, manufacture some small quantities of oleomargarine containing a harmless and wholesome coloring matter, which said coloring matter or no other ingredient therein contained caused it to look like or appear to be butter; that all of the oleomargarine so made was manufactured and sold in separate and distinct form, labelled oleomargarine, as provided by law, with the name and per cent. of each ingredient therein, and was sold only as oleomargarine; that it was so manufactured for the purpose of being sold to customers at points in other states outside of the State of Ohio; that it was not sold or offered to be sold or kept in defendant's possession with intent to sell the same within the State of Ohio; that it was only sold at points outside of the State of Ohio, and to such points shipped in separate, original and unbroken packages. The defendant further avers that the said oleomargarine manufactured by it, including that so manufactured with coloring matter as herein admitted, is a wholesome, palatable and nutritious article of food and in no way deleterious to the public health or welfare. It is of the natural color of butter and looks like butter, and was colored when and as herein admitted by harmless ingredients to ren-

der it more attractive to customers, and not for the purpose of making it appear to be anything else than oleomargarine. Said oleomargarine is of a light-yellow color and looks like butter and cannot be made to look unlike butter unless the manufacturer is allowed to color it. It further avers that oleomargarine is, and during all the time referred to, was a recognized article of commerce, regulated as such for revenue purposes by the Act of Congress of August 2, 1886.

This defendant corporation respectfully represents that the use of such coloring matter in the manufacture of its oleomargarine, as above set forth, was not contrary to its corporate charter or in violation of law.

3. And now, for a third defense, the defendant here adopts all and singular the averments and statements in the foregoing first and second answers contained as fully as if the same were here again specially stated, and avers that the use of a harmless and wholesome coloring matter as hereinbefore admitted is not in contravention of or contrary to the statutes of this State prohibiting the sale of coloring matter in the manufacture of oleomargarine for the reason that both of said statutes, to wit, the act of March 7, 1890, entitled, an "Act to prevent deception in the sale of dairy products and to preserve the public health," and the act of May 16, 1894, entitled, an "Act to prevent fraud and deception in the manufacture and sale of oleomargarine and promote the public health in the State of Ohio," are laws passed in the interest of the public health and to prevent the use of deleterious and injurious substances in the manufacture and preparation of food, and do not prohibit in the manufacture of oleomargarine the use of harmless and wholesome coloring matter

such as is used and by law permitted to be used in the manufacture of butter.

And this defendant corporation further avers and represents to the court that if such use is prohibited by said statutes, then said statutes and each of them to that extent are unconstitutional and void, and in contravention of and repugnant to the provisions of the constitution of the State of Ohio, and also are in contravention of and repugnant to the provisions of the Constitution of the United States, and especially the fourteenth article of amendment.

4. And now, for a fourth defense, the defendant here adopts all and singular the averments and statements in the foregoing first, second and third answers contained as fully as if the same were here again specially stated, and avers that if the use of coloring matter, as set forth above, be unlawful, it is because inhibited by section one of an act of the General Assembly of the State of Ohio, passed May 16, 1894, and entitled, an "Act to prevent fraud and deception in the manufacture and sale of oleomargarine and promote public health in the State of Ohio;" which said section one is in the words and figures following, to wit: (Here follows copy of said act.)

And this answering defendant says that because said statute, by its terms, makes or purports to make it unlawful to use any coloring matter, however healthful or harmless, in the manufacture of oleomargarine for any purpose, it is repugnant to the constitution and bill of rights thereof of the State of Ohio, and is therefore unconstitutional and void.

5. And now, for a fifth defense, the defendant here adopts all and singular the averments and statements in the foregoing first, second, third and fourth answers contained as

fully as if the same were here again specially stated, and further avers that said section one of said Act of May 16, 1894, above quoted and all proceedings under or by virtue thereof against this defendant are unlawful and void, because said section one of said act is in contravention of the Constitution of the United States, and especially section eight of article one of said Constitution and section one of the fourteenth article of amendment.

6. And now, for a sixth defense, the defendant here adopts all and singular the averments and statements in the foregoing first, second, third, fourth and fifth answers contained as fully as if the same were here again specially stated, and says that the petition avers that this defendant has violated the provision of an act of the General Assembly of the State of Ohio, passed March 7, 1890, and entitled, an "Act to prevent deception in the sale of dairy products and to preserve the public health," which reads as follows: (Here follows copy of said Act.)

This defendant corporation says that said statute so far as it relates to oleomargarine, was repealed by the terms of section 6 of the Act of May 16, 1894, entitled, an "Act to prevent fraud and deception in the manufacture and sale of oleomargarine and promote public health in the State of Ohio." It further says that should said law be held not to have been repealed because of the unconstitutionality of section one of the Act of May 16, 1894, or for any other reason, that it is nevertheless inoperative and void because it is by its terms repugnant to and in contravention of the constitution of the State of Ohio, including the bill of rights thereof, and repugnant to and in contravention of the Constitution of the United States, and especially section 8 of article one and the fourteenth amendment thereto.

7. And now, for a seventh defense, the defendant here adopts all and singular the averments and statements in the foregoing first, second, third, fourth, fifth and sixth answers contained as fully as if the same were here again specially stated, and says that this court has no jurisdiction to hear and determine this controversy, and that this proceeding should not be further entertained or heard by the court for the reason that the charges made against this defendant by said petition are all of them crimes under the statutes of Ohio, if said statutes are valid and said petition states any colorable cause of action against the defendant, and that, therefore, this proceeding cannot be prosecuted, and judgment therein against the defendant ought not to be rendered, and, further, for the reason that no conviction has ever been had in any of the courts of this State against the defendant for the violation of any statute for the breach of which it is here claimed the defendant has rendered itself liable to the judgment asked in the petition; and this defendant respectfully represents to the court that this proceeding is in contravention of the Constitution of the United States.

By THOMAS E. STEELE and
JOHN S. GILL, of Counsel."

To this rather mixed pleading, the plaintiff filed a demurrer as to those defenses, which attacked the validity and constitutionality of the Acts, and a reply of general denial as to the other defenses set forth.

The issue of fact having been presented, the court appointed a master commissioner to take the testimony, which was accordingly done, and submitted to the court; upon consideration of which the Supreme Court of Ohio made the following order: (Record, page 15.)

JUDGMENT OF THE COURT

"This cause coming on to be heard upon the petition and answer testimony and argument of counsel, upon consideration thereof the court find that the averments of the petition are true, and that the defendant, the said The Capital City Dairy Company, has offended against the law of this State, misused its corporate authority, franchise, and privileges and assumed franchises and privileges not granted to it, and has assumed and exercised rights, privileges and franchises specially inhibited by law, whereby it has forfeited its corporate right, privileges and franchises.

It is therefore considered and adjudged that said corporation be ousted and altogether excluded from such corporate rights, privileges and franchises, and that said corporation be dissolved.

It is therefore ordered that Charles D. Beardsley and Harry P. Junk be, and they hereby are, appointed trustees of the creditors and stockholders of the said corporation, with full power to settle the affairs of the corporation, to collect and pay debts and to divide among the stockholders of said corporation the money and property remaining, and that they report their proceedings to this court for confirmation.

And it is ordered that said trustees, before entering upon the duties of their office, give bond in the sum of $50,000.00, conditioned according to law, with sureties to the approval of this court.

The said defendant, its officers and agents, are hereby directed and required to turn over to said trustees all money, property, books, deeds, notes, bills, obligations and papers of every description within the custody, power or control of

the officers of said defendant or either of them belonging to said defendant or anywise necessary to the settlement of the affairs or for the discharge of the debts and liabilities of said defendant.

It is further ordered that said trustees proceed forthwith to cause an inventory and appraisement of said property and effects to be made and filed in court, the said appraisal to be made under oath by two competent disinterested citizens of Franklin county.

Thereupon came the said Charles D. Beardsley and Harry P. Junk and present their bond in the sum of fifty thousand dollars in due form, with the Fidelity & Deposit Company of Maryland as surety; which bond and surety are approved by the court.

On motion of the said defendant, this court doth order that it be certified and made part of the record in this case, and of the judgment rendered herein by this court at the present term thereof, to wit, on the tenth day of April, A. D. 1900, and of the entry thereof, that in the rendition of said judgment it became and was material to the case to determine whether an act of the General Assembly of the State of Ohio, passed March 7, 1890, and entitled "An act to prevent deception in the sale of dairy products and to preserve the public health," and an act of the General Assembly passed May 16, 1894, entitled, "An act to prevent fraud and deception in the manufacture and sale of oleomargarine and promote public health in the State of Ohio," and an act of the General Assembly passed May 17, 1886, entitled, "An act to prevent adulteration of and deception in the sale of dairy products, supplementary to chapter II, title I, part 4, of the Revised Statutes, as amended by an act of the General Assembly,

passed March 21, 1887, entitled, "An act to amend Sections 1, 6 and 7 of an act passed May 17, 1886, to prevent adulteration and deception in the sale of dairy products, and section 4 of an act of the General Assembly passed March 20, 1884, that act being entitled, "An act to provide against the adulteration of food and drugs," were severally laws of said State, and were and are of binding force and validity against the said defendant.

The court further order that it be certified that the said defendant on the hearing of the said cause claimed and asked this court to hold that each and all of said acts were and are in violation of and repugnant to section 8 of article I of the Constitution of the United States, which ordains that "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," and that they severally were a violation of and repugnant to the fifth article of amendment to the Constitution of the United States, which provides, that "no person shall be deprived of life, liberty, or property without due process of law," and that they severally were repugnant to and in violation of section 1 of the 14th article of amendment to the Constitution of the United States, which provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the states wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;" and this court orders it to be further certified that this court decide and adjudge that each and all of said acts herein mentioned,

passed by the General Assembly aforesaid, were not in violation of nor repugnant to said section 8 of article I of the Constitution of the United States, and are not repugnant to or in violation of the 5th article of amendment to the Constitution of the United States, and are not repugnant to or in violation of the 14th article of amendment to the Constitution of the United States, and decided and adjudged that each and all of said acts were and are valid and binding in their entirety upon the said defendant, and thereupon rendered said judgment, which is founded upon said decision of this court, that said acts were and are of binding force and validity against the said defendants, and this court rendered final judgment against the defendant, as is shown by the entry heretofore made of the said judgment and order; and it is further ordered by this court to be certified that the question of the validity of said acts of the General Assembly in the particulars mentioned hereinbefore were severally drawn in question on the hearing and decision of this case as being repugnant to and in violation of section 8 of article I of the Constitution of the United States, and as being repugnant to and in violation of the 5th article of amendment to the Constitution of the United States, and as being repugnant to and in violation of section 1 of the 14th article of amendment to the Constitution of the United States, and that the decision of the court was in favor of the validity of said acts and each of them in their entirety as against the said defendant; and it is hereby certified that this court is the highest court of law and equity in the State of Ohio in which a decision of this case can be had."

O. B. No. 17, pp. 130, 149 and 150.

Thereupon the defendant gave a bond and obtained a stay of the judgment pending the decision of the cause in the Supreme Court of Ohio. (Record, pp. 17-18.)

The opinion * of the Supreme Court of Ohio in the case is as follows:

OPINION

1. The police power of the State is properly exercised in the prevention of deception in the sale of dairy products, and in the protection of the health of the people, and it is within the scope of this power to regulate the manufacture and sale of articles of food, even though the right to manufacture and sell such articles is a natural right guaranteed by the constitution.

2. The acts of March 7, 1890 (87 O. L., 51), and May 16, 1894 (91 O. L., 274), and of May 7, 1886 (83 O. L., 178), as amended March 21, 1887 (84 O. L., 182), and of March 20, 1884 (81 O. L., 67), (the purpose of which acts is to prevent deception in the sale of dairy products and to preserve the public health), are a reasonable exercise of the police power and do not contravene any section of the constitution.

3. The mere fact that the criminal laws of the State provide for the punishment by fine of those who offend against the above recited sections is not a bar to a proceeding in quo warranto to oust a corporation engaged in the manufacture of oleomargarine from the exercise of its rights to be a corporation.

4. Where the manner of conducting a business which the State's charter gives power to a company to conduct as a corporation, is in disregard and defiance of the laws of the State relating to that business, on abuse of the power results, and quo warranto may properly be invoked to stop the abuse, and if the abuse be flagrant, to oust the corporation.

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*In *Machine Company* vs. *Skinner*, 139 U. S., 293, this court holds that "in determining the ground upon which a judgment of a state court was rendered, this court may refer to the opinion of that court."

Likewise in *Fire Association* vs. *New York*, 119 U. S., 110, this court holds, that "the opinion of the State Supreme Court may be consulted on motion to dismiss."

(Decided April 10, 1900.)

Spear, J.: "The defendant is an Ohio corporation, chartered June 27, 1893, and thereby granted the right, privilege and franchise of manufacturing, selling and dealing in oleomargarine and the material and utensils employed in the manufacture, storage and transportation thereof and all things incident thereto. Its principal place of business is the city of Columbus. The complaint is that the defendant has continuously since about the time of its creation offended against the laws of the State, misused its corporate authority, franchises and privileges and assumed franchises and privileges not granted to it, and has assumed and exercised rights, privileges and franchises specially inhibited by law in these particulars, to wit:

1. It has manufactured and sold an article in imitation and semblance of natural butter, which article was made of animal and vegetable oils and compounds with milk or cream or both, which was not in separate and distinct form and in such manner as would advise consumers of its real character, and was not free from coloring matter or other ingredients, causing it to look like and appear to be butter, which said article was not butter, but was an article made in imitation and semblance thereof. 2. It has manufactured and has offered and exposed for sale and has sold and delivered and held in its possession with intent to sell and deliver in quantities from ten thousand and twenty thousand pounds daily, oleomargarine containing coloring matter, namely, annatto and other coloring matter to relator unknown. 3. It had manufactured and sold a substance purporting and appearing to be butter and having the semblance of butter, but which was not butter, but was oleomargarine, and the parcels and

rolls thereof were not distinctly and durably stamped or painted or marked in the true name thereof in ordinary bold-faced capital letters. 4. It has refused and still refuses to deliver and furnish to the duly appointed, qualified and acting inspector and agent of the dairy and food commissioner of the State any sample or quantity of oleomargarine manufactured by it, although duly demanded by him and the value of the same for a ten-pound package thereof or any other reasonable quantity thereof was tendered it for the analysis thereof, and has refused and still refuses to permit said inspector and agent to enter its factory for any purpose whatsoever, and has refused and still refuses to permit him to examine or cause to be examined any of the products manufactured by it; and, further, that all of said violations of law have been made and done by the defendant with full knowledge of the said violations and for the express purpose and intent of violating and evading said laws for the purpose of deceiving the people of this and other states as to the real character of its said product, contrary to the Act of March 7, 1890, entitled, "An Act to prevent deception in the sale of dairy products and preserving the public health."

Evidence in support of these charges was introduced on the part of the State. No evidence was offered by defendant. Without going into detail, it is sufficient to say that the evidence compels the conclusion that the acts charged have been committed by defendant, and that their frequency and the conduct of the officers of the defendant in relation thereto warrant the further conclusion that the acts were committed wilfully and with the intent to disregard the provisions of statute and to defy the officers of the State whose specific duty it is to enforce the law in this behalf; so that the natural

results of all such acts are presumed to have been intended. Objection is offered to the competency of testimony as to the acts of the defendant since the commencement of this proceeding; but inasmuch as the matter of final judgment depends somewhat upon the discretion of the court, we regard this evidence competent as bearing upon the animus, purpose, knowledge and intent of the defendant and as calculated to aid the court in the exercise of a proper discretion respecting the character of the judgment to be entered.

The defense offered is twofold: First, that the acts, a violation of which is charged are unconstitutional as being an arbitrary and unauthorized attempt to interfere with the natural right to conduct a legitimate business which is beneficial to the public as well as profitable to its promoters; and, second, that this proceeding cannot be maintained because, if the laws referred to be valid, their violation is punishable in a criminal proceeding, and a definite, adequate penal sentence may follow a conviction in such proceeding; and, beside, the right to manufacture and vend oleomargarine is not a franchise, and its abuse, should the same be shown, is not the abuse or misuse of a franchise and not the proper subject of a quo warranto proceeding; hence relator has mistaken his remedy, and its petition should be dismissed.

The statutes claimed to have been violated are the act of March 7, 1890, entitled, "An Act to prevent deception in the sale of dairy products and to preserve the public health," annotated in Bates' Statutes as sections 4200-13-14, by which it is provided, that (here follows enumeration of the statute).

Also the act of May 16, 1894, having a like title, now section 4200-16, which reads (here follows enumeration of the statute).

Also the first section of the act of May 17, 1886, as amended March 21, 1887, entitled, "An Act * * to prevent adulteration and deception in the sale of dairy products," now section 4200-30, which provides (here follows enumeration of the statute named).

Also section 4 of the act of March 20, 1884, entitled, "An Act to provide against the adulteration of food and drugs," now section 4200-7, which provides (here follows enumeration of the statute named).

It is not intended here to enter into a general dissertation respecting the origin or method of manufacture of oleomargarine or its usefulness or healthfulness when manufactured of pure and clean materials and in a cleanly and wholesome manner. It is sufficient to say that it is not, within the meaning of these acts, butter when made in any manner and of any ingredients; that in its natural state it is nearly white in color, while butter in its natural state—in general (although not always) yellow, but oleomargarine when colored can be made and is made to so nearly resemble butter as to be easily and, when not distinctly marked, usually mistaken for it, and that it may be and often is manufactured from such material and in such manner as to be deleterious to health. With this general statement we proceed to consider seriatim the objections and defenses before stated.

1. The constitutionality of the several acts. What is their purpose and scope? At the outset it should be understood that the statutes do not undertake to prohibit the manufacture or sale of oleomargarine; on the other hand, their expressed purpose, gathered from text and title as well, is to regulate its manufacture and sale. In substance they provide that no one shall manufacture for sale, any article in imitation of butter, or any compound or substance or any

human food in imitation or semblance of natural butter, which is not pure butter; that no one shall manufacture or offer or expose to sale any oleomargarine which contains any coloring matter; that no one shall sell any substance purporting, appearing or represented to be butter, or having a semblance of butter, unless it be under its true name and with proper mark designating such name, and that all persons dealing in food shall, upon proper application and tender of price, furnish a sample suitable for analysis. Construed with that part of section 2 of the act of March 7, 1890, which provides that oleomargarine may be manufactured "in a separate and distinct form and in such manner as will advise the consumer of its real character, free from any coloring matter or other ingredient causing it to look or appear to be butter," it becomes entirely manifest that this legislation is regulation, not prohibition. So that we may leave out of consideration that portion of the argument which seeks to establish on the one hand and deny on the other, a right in the State to directly prohibit its sale or legislate so as to reach that result by indirection. The question therefore, is, Do the sections of the statute quoted or any of them violate our bill of rights, which guarantees the right of acquiring and protecting property, or do they in any way violate the constitution as being subversive of the constitutional right to liberty and the enjoyment of property? In other words, Is it within the legislative competency to establish regulation for the prevention of fraud and deceit in the sale of articles of food?

We are of the opinion that the question is not an open one in Ohio. This court has held again and again that the police power of the State is properly exercised in the protection of the people in all matters concerning their health, and that it is within the scope of this power to regulate the

manufacture and sale of articles of food, even though the right to so manufacture and sell is a natural right guaranteed by the constitution. Conceding that, where the pursuit rests upon the natural right and the product is not harmful, this power may not be exercised in a way which will result practically in inhibition, though under the guise of regulation, and in fostering the interests of a rival product; yet, where the manufacture is conducted in such a way as is calculated to deceive, lead the buyer to suppose he is purchasing an article of food which is everywhere recognized as wholesome and especially where the article sought to be regulated may easily be manufactured so as to be harmful and thus result in fraud upon and injury to the public, the police power is properly exercised in the regulation of the manufacture and sale of such article by such requirements as will tend to insure the public against fraud and injury. Its proper disposition is not forbidden. As stated in Jordan vs. Overseers, infra, the owner "has power to mortgage the property or give direction to his labors at his pleasure, subject only to the paramount claims of society, which require that his enjoyment may be modified by the exigencies of the community to which he belongs and regulated by laws which render it subservient to the general welfare." These several statutes, framed to accomplish this end, entail no particular hardship, are reasonable in their requirements, and do not contravene any section of the constitution; nor is there any question whatever in regard to the power of the State to compel a sample for analysis of any article of food. It would be a waste of space to argue the matter. We hold that in that particular also the statute is reasonable and just. Jordan vs. Overseers, 4 Ohio 295; the State vs. Ruedy, 57 Ohio St., 224. Authorities to the same point are numerous, but not necessary. However, we

call attention to a recent utterance of the Supreme Court of the United States, in Gundling vs. Chicago, which involved the right of the city to forbid the sale of cigarettes without a license, opinion by Mr. Justice Peckham:

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of citizens are unnecessarily and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference.

It is not a valid objection to the ordinance that it partakes of both the character of a regulation and also that of an excise or privilege tax. * * * * * So long as the State law authorizes both regulation and taxation it is enough, and the enforcement of the ordinance violates no provisions of the Federal Constitution.

2. The remedy by criminal prosecution. It is enough to say of this objection that the remedy is not adequate. The object of the statute is to protect the public. In the nature of things a small fine is not a sufficient deterrent to accomplish the desired end, especially in the case of a company possessed of ample means and conducting a large business. The difference between the price at which butter may be manufactured and sold and that at which oleomargarine may be

offered is so large that the temptation to impose upon the public is too great to be resisted. In addition to this, there are practical difficulties in obtaining convictions which the experience of the dairy and food commissioner, as shown by his report, a public document, fully attests.

3. The right to manufacture and sell oleomargarine not a franchise, and hence the proceeding of quo warranto not a proper remedy. It would seem a sufficient answer to this proposition to say that if it be true, then the defendant has no franchise whatever. Its charter, the certificate of the secretary of state, gives it "the right, privilege and franchise of manufacturing, selling and dealing in oleomargarine," etc., etc. This authority carries the implication that the business must be conducted in conformity to the laws of the State. It could not have been the intent of the General Assembly in the enacting laws permitting the formation of corporations to give them power to override the State, although the conduct of the officers of the defendant would seem to imply that they have entertained a different opinion. The time has not yet arrived when the created is greater than the creator, and it still remains the duty of the courts to perform their office in the enforcement of the laws, no matter how ingenious the pretexts for their violation may be nor the power of the violators in the commercial world.

In the present case the acts of the defendant have been persistent, defiant and flagrant, and no other course is left to the court than to enter a judgment of ouster and to appoint trustees to wind up the business of the concern.

Judgment accordingly."

THE ASSIGNMENT OF ERRORS of plaintiff in error, is as follows: (Record, pages 28-29.)

"Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the capitol, in the city of Washington, comes the said The Capital City Dairy Company, a corporation, by Thomas E. Steele, its attorney, and says that in the record and proceedings aforesaid, there is manifest error, in this, to wit:

The Supreme Court of the State of Ohio erred in holding and deciding that the act of the General Assembly of the State of Ohio, passed March 7, 1890, entitled, An Act to prevent deception in the sale of dairy products and preserve the public health," was not in violation of nor repugnant to the Constitution of the United States in any of the particulars as claimed by the said plaintiff in error, and further erred in deciding that said act of the General Assembly of the State of Ohio, passed March 7, 1890, was and is valid and binding upon said plaintiff in error.

2. The Supreme Court of the State of Ohio erred in holding and deciding that an act of the General Assembly of the State of Ohio, passed May 16, 1894, entitled, "An Act to prevent fraud and deception in the manufacture and sale of oleomargarine and promote public health in the State of Ohio," is not in violation of nor repugnant to the Constitution of the United States in any of the particulars claimed by the said plaintiff in error, and further erred in deciding and holding said act of the General Assembly of the State of Ohio, passed May 16, 1894, was and is valid and binding upon said plaintiff in error.

3. The Supreme Court of the State of Ohio erred in holding and deciding that an act of the General Assembly of the State of Ohio, passed March 7, 1890, entitled, "An Act to prevent adulteration of and deception in the sale of dairy products," as amended by the act of March 21, 1887, entitled, "An Act to amend sections 1, 6 and 7 of an act passed May 17, 1886, entitled, "An Act to provide against the adulteration of food and drugs," is not in violation of nor repugnant to the Constitution of the United States in any of the particulars as claimed by the said plaintiff in error; and further erred in holding and deciding that said act of the General Assembly of the State of Ohio, passed May 17, 1886, as amended March 21, 1887, was and is valid and binding upon said plaintiff in error.

4. The Supreme Court of the State of Ohio erred in holding and deciding that section 4 of an act of the General Assembly of the State of Ohio, passed March 20, 1884, entitled, "An Act to provide against the adulteration of food and drugs," is not in violation of nor repugnant to the Constitution of the United States.

The Supreme Court of the State of Ohio further erred in holding and deciding that the proceeding in quo warranto as prosecuted and decided was not in contravention of the Constitution of the United States.

And the said The Capital City Dairy Company, a corporation, prays that the judgment aforesaid of the Supreme Court of the State of Ohio may be reversed, annulled and altogether held for naught, and that it may be restored to all things which it hath lost by reason of the said judgment.

THOMAS EWING STEELE,
Attorney for Plaintiff in Error.

ARGUMENT.

AS TO THE MOTION TO DISMISS.

The Supreme Court of Ohio, sitting first as a court to determine the facts, finds, as a matter of fact as shown in their order above, "that the averments of the petition are true, and that the defendant, the said The Capital City Dairy Company, has offended against the laws of this State, misused its corporate authority, franchise and privileges, and assumed privileges and franchises not granted to it, and has assumed and exercised rights, privileges and franchises specially inhibited by law, whereby it has forfeited its corporate right, privileges and franchises."

As this corporation was an Ohio corporation created by the laws of Ohio, the finding of the Supreme Court to the effect that it had offended against the law of the State, misused its corporate authority, should of itself be conclusive. The fact that the Supreme Court of Ohio does not proceed to enumerate in detail the various ways in which the defendant company had misused its corporate authority, privileges and franchises, and does not enumerate the various rights, privileges and franchises which it had assumed, and which were inhibited by law, must be resolved by this court in favor of the motion to dismiss, under the ruling laid down in the case of *Eustis* vs. *Bolles,* 150 U. S., 370, which has been so often reaffirmed by this court, and in the case of *Remington Paper Company* vs. *Watson,* 173 U. S., 443, which hold that:

"Where a state court has based its decision on a local or

state question, the logical course here is to dismiss the writ of error."

Moreover in the case of *De Saussure* vs. *Gaillard*, 127 U. S., 216, this court has announced the doctrine that:

"To give this court jurisdiction of a writ of error to a state court, it must appear affirmatively not only that a federal question was presented for decision, to the highest court of the state having a jurisdiction, but that its decision was necessary to a determination of the cause, and that it was actually decided, or that a judgment as rendered could not have been given without deciding it."

And this same doctrine is reaffirmed by the court in the later case of *Beaupre* vs. *Noyes*, 138 U. S., 397.

Even more applicable is the case of *Machine Company* vs. *Skinner*, 139 U. S., 293, where this court holds:

"Where it does not appear upon what ground the highest court of the state places its judgment, and a judgment may be supported without deciding a federal question, this court is without jurisdiction of it in error."

The Supreme Court of Ohio, therefore, has found as a matter of fact that the averments of the petition were true, and that the charges of the wilful violation therein contained, were sustained. Let us see for a moment if each and every one of these charges are such as would even fairly raise a federal question, or are such as would even admit of a federal question being raised. According to the petition (the averments, of which the Supreme Court of Ohio found as a matter of fact, to be true), the defendant corporation was guilty of the following charges:

1. It manufactured and sold oleomargarine which was in imitation and semblance of natural butter.

2. It compounded animal and vegetable fats with cream and milk, and thereby manufactured and sold a substance in imitation and semblance of natural butter.

3. It did not manufacture and sell its oleomargarine in a separate and distinct form, and in such manner as would advise consumers of its real character, but on the other hand, its product looked like and appeared to be butter.

4. The product manufactured and sold by this corporation contained yellow artificial coloring matter, to wit, annatto.

5. It refused to deliver and furnish to the duly appointed inspectors of the Dairy and Food Department of the State of Ohio, a sample or quantity of its oleomargarine as required by law, and refused to permit such inspectors to enter into its factory or warerooms.

6. Said defendant corporation had refused and still refuses to permit the inspector to examine or cause to be examined, any of the product manufactured by it.

The first three of the statutes mentioned above, merely *regulate* the manufacture and sale of oleomargarine, and the sole and exclusive object of all three, is the same, to wit: that oleomargarine shall not be manufactured in Ohio in such shape, manner or form as would cause it to look like and resemble butter. This power of regulation is inherent in a state, and the only question, therefore, that this court need answer, is, "has the Legislature of the State of Ohio the power to enact statutes *regulating* the manufacture of oleomargarine, within its own limits?"

"It being within the constitutional power of the Legislature to establish regulations for the prevention of fraud in the sale of articles of food, it is generally for the Legislature to determine what regulations are needed for that purpose."

Cooley Const. Lim. (3rd Ed., 168).

The Supreme Court of the United States, in the case of *Powell* vs. *Pennsylvania*, 127 U. S., 678, in passing upon the

validity and constitutionality of the Pennsylvania statutes in reference to oleomargarine, which were absolutely prohibitory, are as follows, as shown by the four syllabi thereof:

"(1) The fourteenth Amendment to the Constitution was not designed to interfere with the exercise of the police power by the state for the protection of health, the prevention of fraud, and the preservation of the public morals.

"(2) The prihibition of the manufacture out of oleaginous substances, or out of any compound thereof other than that produced from unadulterated milk or cream from unadulterated milk, of an article designed to take the place of butter or cheese produced from pure unadulterated milk or cream from unadulterated milk; or the prohibition upon the manufacture of any imitation or adulterated butter or cheese, or upon the selling or offering for sale or having in possession with intent to sell the same, as an article of food, is a lawful exercise by the state of the power to protect by police regulations, the public health."

"(3) Whether the manufacture of oleomargarine or imitation butter of the kind described in the act of the Legislature of Pennsylvania of May 21, 1885 (Laws of Penn. of 1885, p. 22, No. 25), is, or may be, conducted in such a way or with such skill and secrecy as to baffle ordinary inspection, or whether it involves such danger to the public health as to require for the protection of the people, the entire suppression of the business, rather than its regulations, in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy, which belong to the Legislative Department to determine."

"(4) The statute of Pennsylvania of May 21, 1885, 'for the protection of the public health and to prevent adulteration of dairy products and fraud in the sale thereof,' neither denies to persons within the jurisdiction of the state the equal protection of the laws; nor deprives persons of their property without that compensation required by law; and is not repugnant in these respects to the fourteenth Amendment to the Constitution of the United States."

It will be noted in the foregoing case that even the dissenting opinion of Mr. Justice Field would, nevertheless, sustain the Ohio laws, as he says in conclusion (p. 699):

"The fault which I find with the opinion of the court on this head, is that it ignores the distinction between regulation and prohibition."

In the case of *Schollenberger* vs. *Pennsylvania*, 171 U. S., 1, the Supreme Court of the United States holds that oleomargarine is an article of commerce and that, therefore, the "original package" rule would apply and to that extent the act prohibiting the sale of oleomargarine in Pennsylvania was invalid. But that holding is not germane to this case since no such question arises. If the defendant were a non-resident manufacturer seeking to sell citizens of Ohio in original packages, we would take up the question and discuss it.

But the Supreme Court in this same opinion, reaffirms the famous case of *Powell* vs. *Pennsylvania*, 127 U. S., 678, supra, in these words (p. 15): "It is claimed, however, that the very statute under consideration, has heretofore been held valid by this court in the case of *Powell* vs. *Pennsylvania*, 127 U. S., 678. That case did not involve rights arising under the commerce clause of the Federal Constitution. The article was manufactured and sold within the state, and the question was one as to the police power of the state acting upon a subject always within its jurisdiction." And again (p. 16): "The right of state to enact laws in relation to the administration of its internal affairs is one thing, and the right of a state to prevent the introduction within its limits of an article of commerce is another and a totally different thing. Legislation which has its effect wholly within the state and upon products manufactured and sold therein, might be held valid as not in violation of any provision of the Federal Constitution, when at the same time, legislation directed towards prohibiting the importation within the state, of the same article manufactured outside of its limits might be regarded as illegal because in violation of the rights of citizens of other states arising under the commerce clause of that instrument."

For these same reasons, "upon the principle recognized in the Pennsylvania case," the pink law of New Hampshire, as to outside shippers, is held invalid in the case of *Collins* vs. *New Hampshire*, 171 U. S., 30.

Another authoritative case on the subject of state regulation of oleomargarine, imported into the state, is found in *Plumley* vs. *Massachusetts*, 155 U. S., 461, where it is held that the State Legislature has power to enact a law forbidding the manufacture and sale of oleomargarine. And further that such a statute, i. e. "to prevent deception in the manufacture and sale of imitation butter," in its application to the sales of oleomargarine artificially colored so as to look like yellow butter, and brought into Massachusetts, is not in conflict with the clause of the United States Constitution investing Congress with power to regulate commerce among the several states.

And in the same case the court further holds that the case of *Leisy* vs. *Hardin*, 135 U. S., 100, "is restrained in its application to the case there actually presented for determination, and held not to justify the broad contention that a state is powerless to prevent the sale of articles of food manufactured in, or brought from another state, and subjects of traffic, or commerce, if their sale may cheat the people into purchasing something they do not intend to buy, and which is wholly different from what its condition and appearance import."

As to the fourth statute of which the court finds the defendant corporation guilty of continuous violation, it will certainly not be seriously claimed that any federal question can possibly be involved.

This statute is to the effect that every person manufacturing or dealing in food, shall furnish to any person interested

on demanding the same, who shall apply to him for the purpose, and shall tender him the value of the same, a sample sufficient for analysis, etc. This statute applies exclusively to persons manufacturing and selling goods within the State of Ohio. This law is the basis of the enforcement of all laws to prevent adulteration of food and drugs; for without it there would be an absolute impossibility to enforce any of the pure food laws. Therefore, if a dealer in adulterated food may sell to consumers and refuse an inspector or other persons desiring a sample for analysis, the enactment of any pure food law for the prevention of adulteration, becomes at once futile and a farce.

Concerning this statute, the Supreme Court, in its opinion given above (Record, p. 24), says:

"Nor is there any question whatever in regard to the power of the state to compel a sample for analysis of any article of food. It would be a waste of space to argue the matter."

THE MOTION TO AFFIRM

The language of Mr. Justice Peckham, in the opinion rendered in *Gundling* vs. *Chicago*, quoted by the Supreme Court, in its opinion below, if still endorsed by this court as it undoubtedly is, should be a sufficient plea in favor of the motion to affirm the judgment below. The decision of this court in the case of *Powell* vs. *Pennsylvania*, 127 U. S., 678, cited above, is more than sufficient authority for the affirming of the judgment below, and the dissenting opinion of Mr. Justice Field in that case, would likewise sustain our motion to affirm.

These and the other cases cited, to wit: the case of *Schollenberger* vs. *Pennsylvania*, 171 U. S., 1, and the case of *Plumley* vs. *Massachusetts*, 155 U. S., 461, show that the questions sought to be raised by plaintiff in error, have become the settled law of this court.

That it is proper practice, therefore, when this is the case, for this court to affirm the judgment below, is no doubt most familiar to this court, and with apologies, therefore, for citing these authorities, we present a few of them.

In the case of *Foster* vs. *Kansas*, 112 U. S., 201, Mr. Chief Justice Wait says (page 206):

"As the question of the constitutionality of the statute was directly raised by the defendant and decided against him by the (Kansas) court, we have jurisdiction; but as every one of the questions which we are asked to consider, have been already settled in this court, the motion to affirm is granted."

Following this statement the Chief Justice cites four previous decisions of the Supreme Court of the United States, showing that the various points of error relied upon had already received judicial interpretation, and hence the motion to affirm was granted.

Also in the case of *Walston* vs. *Nevin*, 128 U. S., 578, this court holds as follows:

"When on a motion to dismiss a writ of error or an appeal for want of jurisdiction, or affirm the judgment below, it appears that there was color for the motion to dismiss and that the contention of plaintiff in error or the appellant has been often pressed upon the court and as often determined adversely, the motion to affirm will be granted."

The following cases all hold to the same opinion, to wit,

that where there is color for a motion to dismiss, the case may be disposed of, by granting the motion to affirm:

Railroad Company vs. *Woodson*, 134 U. S., 614-624.

Mining Company vs. *Milling Company*, 171 U. S., 55.

Bank vs. *Anderson*, 172 U. S., 573.

McQuade vs. *Newton*, 172 U. S., 636.

If, therefore, this court holds, as all its decisions indicate it will, that the last Ohio statute given above requires the furnishing of a sample upon payment of price, is one over which the State of Ohio has exclusive jurisdiction, and that it is not in contravention of the Constitution of the United States, the motion to affirm should be granted.

Probably the latest authority in support of this, is that of *Seeberger* vs. *McCormick*, 175 U. S., 274, in which this court holds:

"The contention even if formally made that plaintiffs in error were seeking to avail themselves of some right or immunity under the Constitution or laws of the United States, does not give this court jurisdiction to review the judgment of the Supreme Court of a state where that judgment was based upon the doctrine of general law sufficient of itself to determine the case."

In conclusion, therefore, we claim, first, that this court is without jurisdiction to hear this cause, because the judgment of the Supreme Court of Ohio, was based upon divers violations of law, some of which cannot possibly involve a federal question, and are of themselves sufficient to sustain its judgment, irrespective of those other violations which might involve a federal question. And for the further reason

that the questions sought to be raised in this court, and over which this court might have jurisdiction, have all been decided adversely to plaintiff in error, and have become the settled law of this court and the writ of error, therefore, has been taken for delay only.*

Respectfully submitted,

E. B. DILLON,
Counsel for Defendant in Error.

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*It is held in *Pierce* vs. *Railway Company*, in error to the Supreme Court, 171 U. S., 641, that it must appear affirmatively that the judgment as rendered could not have been given without deciding the federal question involved. And further, if any other questions were raised and decided against the party claiming error, and such decision is sufficient, notwithstanding the judgment below, the Supreme Court of the United States will not review the judgment.

And to the same effect is *Capital National Bank* vs. *Cadiz Bank*, 172 U. S., 425, and *Harrison* vs. *Morton*, 171 U. S., 38.

In *Railway Company* vs. *Portland Railroad*, 14 Wall., 23, the syllabus is as follows: "The court reasserts the principle that, in cases brought here by writs of error to the state courts, it will not entertain jurisdiction as it appears that, besides the federal question decided by the state courts, there is another and distinct ground, on which the judgment or decree can be sustained, and which is sufficient to support it."